

U.S. DEPARTMENT OF TRANSPORTATION

# **CARGO LIABILITY STUDY**

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## CHAPTER 1. INTRODUCTION

### *1.1 HISTORICAL CONTEXT*

The concept of common carriage developed in the middle ages. Basic to common carriage is the notion of treating all customers in the same way.<sup>1</sup> Besides the duty to avoid discriminating among customers, the other two elements of common carriage are the duties to provide service and to be subject to strict liability.<sup>2</sup>

In 1887 Congress adopted the Interstate Commerce Act. The Act originally applied only to railroads. It established the Interstate Commerce Commission (ICC) and gave it the function of ruling on the reasonableness of rates.

Carrier liability became the subject of Federal legislation in 1906 in the Carmack Amendment to the Interstate Commerce Act.<sup>3</sup> The Carmack Amendment established a codified strict liability regime with established common carrier defenses to liability. The regime provided for full value compensation, except to the extent that carriers were able to limit liability by filing released rates. The 1915 Cummins Amendment, 38 Stat. 1196, abolished the practice of limitations on liability; the second (1916) Cummins Amendment, 41 Stat. 475, permitted limitations on liability through filing of released rates, if those rates were just and reasonable. For various reasons, several types of carriage remained outside of this liability regime.

Motor carriage was brought under the ICC's jurisdiction in the 1935 Motor Carrier Act, 49 Stat. 543 (1935), and thus became subject to the Carmack Amendment's liability regime. Subsequently, freight forwarders also were brought under ICC jurisdiction, 56 Stat. 285 (1942) and 64 Stat. 1113 (1950) and the Carmack liability regime.

Statutory guidance for ICC decisions was provided in the 1940 National Transportation Policy Statement.<sup>4</sup> Public access to, and readily available information about, rates at the ICC was an essential element of its rate examination for reasonableness.

In addition to its jurisdiction over released rates, ICC regulated the processing of claims for loss, damage, injury or delay to property transported in interstate commerce by railroads, express companies, motor carriers, water carriers, and freight forwarders. The ICC established requirements for the filing, acknowledgment, and disposition of claims, and required that a claim be investigated and either paid, declined or compromised. However, ICC did not adjudicate claims. Adjudication was and remains a function of the courts.

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<sup>1</sup> Niagara v. Cordes, 62 U.S. 41, 46 (1858).

<sup>2</sup> Basedow, *Common Carriers Continuity and Disintegration in U.S. Transportation Law*, 18 ETL at 280.

<sup>3</sup> 49 U.S.C. 14706

<sup>4</sup> 49 U.S.C 10101 for motor carrier policy, 49 U.S.C. 13301 for statutory policy application to motor carriage.

The Motor Carrier Act of 1980, 94 Stat. 798 (1980), partially deregulated motor carriage of cargo. Released rates were only required to be reasonable and became easier to obtain. The Staggers Rail Act of 1980, 94 Stat. 1995 (1980), provided substantial deregulation of the railroad industry. In addition, it permitted carriers and shippers to enter freely into contractual agreements on limitation of liability without regard to reasonableness.

Finally the Trucking Industry Regulatory Reform Act of 1994 (TIRRA), P.L. 103-311, title II, eliminated the ICC tariff filing requirement for motor carriers, other than household goods carriers, acting independently in setting their rates. When the Interstate Commerce Commission Termination Act of 1995 (ICCTA), P.L. 104-88, was adopted, much of the Interstate Commerce Act was eliminated. Without ICC oversight of the reasonableness of released rates, the operation of the Carmack Amendment has been significantly changed. Now the courts are the regulators of dispute settlements, unless the parties agree to arbitration or settle disputes themselves. Because shippers and carriers could not fully agree on a new liability regime, Congress directed DOT to perform a study of cargo liability.

### ***1.1.1. CONGRESSIONAL MANDATE***

DOT, having accomplished a study of cargo liability in 1975, was the logical agency to undertake the task of studying cargo liability in 1997. In fact, the earlier DOT study had recommended a repeat examination to detect trends in cargo liability. Thus the Congressional mandate coincided with DOT interest in this subject.

### ***1.1.2 SPECIFICS OF THE STUDY***

Broadly, DOT is required to consider the following factors:

1. Efficient delivery of transportation services.
2. International harmony.
3. Intermodal harmony.
4. Public interest.
5. Interests of carriers.
6. Interests of shippers.
7. Limitation of liability.

The report examines all these factors. Specifically, Congress asked DOT to study whether the loss and damage provisions of what remains of the Carmack Amendment after ICC sunset should be modified or reformed. Although DOT's dominant task is to study the liability of motor carriers and

freight forwarders, DOT also is required to consider the liability regimes of other modes of transportation. In particular, Congress directed DOT to study limitation of liability for the carriers.

### ***1.1.3 SCOPE OF LIABILITY REGIME***

The ICCTA requires DOT to study "whether any modifications or reforms should be made to the loss and damage provision of this section," that is, to Sec. 14706 of title 49, United States Code, (the remains of the Carmack Amendment). This section of the Act describes the liability regime. As discussed further below, significant aspects of motor carrier transportation are not included within the scope of Sec.14706. Thus, these forms of motor carriage are not included within the scope of the study.

Initially, it is important to note that the scope of the Sec. 14706 liability regime was expanded by the elimination of the distinction between common and contract carriers. The ICCTA, Sec. 13102, defines a "carrier" as a motor carrier, a water carrier and a freight forwarder. A motor carrier is specifically defined as a person providing motor vehicle transportation for compensation. The distinction between common carriage and contract carriage has been eliminated. This means that contract carriage has been brought under the liability regime which previously applied only to common carriage.

Many motor carriers' activities are exempted from the application of the Sec. 14706 liability regime, or are treated specially by that section. These are as follows.

1. Agricultural Carriage. Carriage of agricultural products is exempt (Sec. 13506). The purpose of this exemption was to enable farmers to transport their products to the market, and supplies to the farm, without the complications and rigidities of traditional ICC regulations

2. Household Goods. Household goods carriers are treated specially. Under Sec. 14706(f) of title 49, United States Code, carriers of household goods "may petition the Surface Transportation Board to modify, eliminate or establish rates for the transportation of household goods under which the liability of the carrier for the property is limited to a value established by written declaration of the shipper or by written agreement." Carriers of household goods must agree to offer arbitration to shippers as a means of settling disputes concerning damage or loss to the household goods transported. Regulations provide that for household goods, replacement cost must be used as a base for applying a depreciation factor to arrive at the current value of lost or damaged articles. Much of the ICC's compliance work on cargo loss, damage and delay involved failures by carriers to settle shippers' claims in the household goods area. It was the ICC's experience that its authority over household goods carriage could be used as enforcement leverage when self-insured carriers failed to pay even after liability had been admitted. Continued Federal oversight of household goods carriage is the result of Congress' belief that consumers continue to need protective regulation.

3. Express and package carriage: Transportation by express carriers such as United Parcel Service and Federal Express are subject to a standard liability limitation based on weight or on the package. The shipper who chooses such carriage is put on notice of the limitation by clear

language on the bill of lading. The shipper can declare higher value and pay an excess valuation charge.

4. Contract Carriage: Much transportation of goods is under contract and governed by Sec. 14101(b) of Title 49, United States Code, which provides that a carrier may enter into a contract "to provide specified services under specified rates and conditions." This kind of carriage does not fall under Sec. 14706 when so stipulated by the parties. The carrier and shipper negotiating for contract carriage may make any reasonable contractual stipulations, except that they may not waive provisions governing the carrier's registration, insurance, or safety fitness.

Generally, large shippers tend to use the authority under Sec. 14101(b) to establish a contractual liability regime; many smaller shippers do the same. A survey of approximately 100 shippers attending the February 1997 meeting of the National Small Shipments Traffic Conference (NASSTRAC) indicated that approximately one half of the shippers present had long term contracts with their carriers. Contracts of carriage provide the opportunity of clearly regulating liability according to the bargaining leverage of the parties to the contract. However, it is not clear how many knowledgeable shippers give up their rights under Sec. 14706.

5. Incidental to Air: Motor carriage incidental to air, that is, intermodal air-truck freight, is exempt from regulation under 49 U.S.C. 13506(a)(8).

6. Other types of carriage: Many other types of carriage are exempted, for example intrastate carriage;<sup>5</sup> transportation of wood chips; transportation of broken, crushed and powdered glass; transportation in a municipal zone; occasional carriage; and emergency towing, 49 U.S.C. 13506.

The preceding discussion illustrates the great variety of carriers. Ways have been found to vary carriers' liability according to the differing needs of carriers and shippers. The variety of carriers and shippers that remain subject to Sec. 14706 has been studied and their common interests and needs observed.

## ***1.2 THE PHILOSOPHY OF THE 1975 STUDY***

In 1975, the U.S. Government was involved in formulating a multimodal liability regime. DOT had to study the individual modal liability regimes in order to evaluate and make recommendations for a multimodal regime. The issues studied in 1975 are still relevant today:

1. How can the overall cost of transportation, in particular the cost of loss, damage and delay, be reduced by creating a more efficient liability regime?
2. How can settlement of claims be expedited?
3. How can liability regimes be streamlined and made more uniform, certain, and predictable, thus appearing less formidable to shippers?

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<sup>5</sup> See FAA Authorization Act of 1994, P.L. 103-305, title VI, section 601.



4. What are the shippers' cargo liability experiences?
5. What are the carriers' cargo liability experiences?
6. What is the insurance industry's cargo liability experience?

The 1975 study was widely accepted by industry as reflecting the situation as of the time of writing. This report is an updating of that study, reflecting the legislative, regulatory, and economic changes that have occurred in the motor carrier industry over the past two decades.

### ***1.3 PUBLIC COMMENTS***

In preparation of this report, we have solicited and received extensive data and comments from shippers, carriers, forwarders, and the insurance industry. A summary of the comments from major organizations is included in Appendix 1. DOT held a public meeting on February 23, 1996 and received public comments at that meeting. Written comments were received from approximately 350 participants during the remainder of 1996 and 1997.

Congress required DOT to submit a report on the results of this study, together with any recommendations, including legislative recommendations for implementing modifications or reforms. Chapter 8, Recommendations, was prepared after the public comments on the draft report had been analyzed.

## **CHAPTER 2. BASIS FOR CARRIER LIABILITY**

### ***2.1 DEVELOPMENT OF THE CONCEPT OF LIABILITY***

As common law developed, certain professions, institutions, and enterprises serving the general public, including commercial interests, were found to be of "common calling", a status which imposed certain duties toward the customers or clientele they served. Such persons or firms who engaged in transportation were called "common carriers." The duties imposed on these carriers were: to serve all customers; to deliver goods; not to discriminate, and to charge reasonable rates. Around the duty to deliver goods developed a set of legal principles which defined the conditions under which the carrier was obligated to deliver; the conditions under which the carrier might be excused from this duty were specified. These principles established the liability of common carriers with respect to the loss and damage of cargo.

The common law liability of carriers became ingrained in the American commercial system, and, in due course, the principles of carrier liability were incorporated into American statutory law. The most important statutes in this regard are the Interstate Commerce Act of 1887, the Bill of Lading Act of 1893 (Harter Act), the 1906 Carmack Amendment to the Interstate Commerce Act, the Cummins Act of 1915, the Motor Carrier Act of 1980, the Negotiated Rates Act of 1993 (NRA), the Trucking Industry Regulatory Reform Act of 1994 (TIRRA) and the ICCTA. Currently, under the ICCTA neither DOT nor the Surface Transportation Board (STB) has authority to compel a carrier to pay or settle a claim. The function of adjudicating and enforcing claims for loss and damage rests with the courts.

These Acts impose the current liability rules applicable to carriage between any points in the United States and between any point in the U.S. and any point in a foreign country. The Pomerene Bills of Lading Act of 1916 gave further statutory status to the bill of lading and also defined the extent of carriers' liability in relation to the conditions stated in the bill of lading. However, the uniformity of the bill of lading has become eroded by the freedom of the contracting parties to vary and change the motor carrier bill of lading.

These laws thus established a legal structure of full value recovery for loss and damage, except where lower levels of recovery are established. In current U.S. usage, after the ICCTA, the prevalent surface carriage liability structure appears to be founded primarily on contractual limits rather than full value of the cargo. These limits are founded primarily on rate quotations of motor carriers including the released or declared value rates formerly published in their tariffs filed with the ICC, or the terms of their rate agreements with the shippers. It is because of the increasing use of the carriers' freedom to lower their liability for transportation of cargo<sup>6</sup> that Congress found a need to ask for a study of equity in contracts of carriage. The question is: What liability regimes or regime characteristics will most fairly apportion the risk of carriage and of transportation costs among the various parties?

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<sup>6</sup> In particular transportation that used to be called motor common carriage.

## **2.2 CARRIER LIABILITY**

When considering liability it is necessary to distinguish among modal regimes. These regimes differ according to variances in the governing national laws and international conventions. The following paragraphs compare the liability regimes applicable to the various modes.

### **Rail Carriers**

Carriage by rail is not governed by the ICCTA, 49 USC 14706. Under Sec. 11706 of title 49, United States Code, the rail carrier is liable to the person entitled to recover for the actual loss or injury to property caused by it. However a rail carrier may establish rates for transportation of cargo under which (i) the liability for carriage is limited to a value established by written declaration of the shipper or by written agreement between the shipper and the carrier; or (ii) specified amounts are deducted, pursuant to written agreement between the shipper and the carrier, from any claim against the carrier with respect to cargo carried.

The Staggers Rail Act of 1980 gave rail carriers freedom to limit liability contractually, without Governmental oversight of the reasonableness of established rates.

Actions may be brought only against the originating rail carrier at the point of origin; against the delivering rail carrier in the judicial district where the claimant has its principal place of business if the delivering carrier also operates in that district; or at the point of destination. Claims also may be brought in the district where the loss or damage is alleged to have occurred. Claimants have at least nine months to bring a claim and up to two years to file suit, 49 USC 14706(e).

The question may be posed whether a liability regime in common for rail and motor should be reestablished in the Interstate Commerce Act. That is one of the options considered.

Rail carriers' liability for loss and damage of goods transported between points within a given country is governed by the law of that nation. Carriers' liability for goods moving between European countries is governed by the CIM Convention (Convention Concerning the Carriage of Goods by Rail). There is no similar convention applicable to traffic moving internationally by rail in North America.

### **Motor Carriers**

Under Sec. 14706, United States motor carriers are liable to the person entitled to recover under the bill of lading or receipt for the goods. The carriers' liability is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported within the United States, or from a place in the United States to a place in an adjacent foreign country, when transported under a through bill of lading.

Secondly, a carrier may limit liability if that limit would be reasonable under the circumstances surrounding the transportation. The statute is not specific as to who should determine

reasonableness of a liability limitation. The statute does not assign to either DOT or STB the function of determining reasonableness, and it appears that this issue may be left to the courts to determine in a claim for damages.

Unless a rate is a joint rate with a water carrier for a movement in the noncontiguous domestic trade, the motor carrier need not file tariffs with the STB. However, the ICCTA provides that the carrier shall, upon request of the shipper, provide the shipper with a written or electronic copy of the rate, classification, rules, and practices (including limits on liability) upon which any rate applicable to a shipment is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.

Third, 49 USC 14101(b) provides that a carrier and a shipper may enter into a service contract governed by specified rates and conditions. This kind of contract is not governed by the standard liability regime in Sec. 14706. In a service contract the shipper and/or carrier may waive any rights and privileges relating to motor carriage.

Civil actions may be brought in either Federal or State courts against the delivering carrier in a court in a State where the defendant carrier operates. Carriers may not provide a period of less than 9 months for filing claims or less than 2 years for bringing civil action, 49 USC 14706(e).

Household goods carriers may petition the STB to modify, eliminate or establish transportation rates. Consequently the Board may limit liability to a value established by written declaration of the shipper or by written agreement between the parties.

With respect to international motor carrier operations in Europe the carriers' liability is governed by the CMR Convention (Convention on the Contract for the International Carriage of Goods by Road) which became effective in 1961. The liability provisions of this Convention are similar to the provisions of the CIM Convention. The Inter-American Convention on international carriage of goods by road, which has been under consideration by Organization of American States (OAS) member countries, would be a counterpart to the CMR Convention for the Americas.

## **Ocean Carriers**

The Harter Act and the 1936 Carriage of Goods by Sea Act (COGSA) are the two primary United States statutes governing water carrier liability. COGSA is the United States enactment of the provisions of the 1924 Brussels Convention (Hague Rules) on the maritime bill of lading. The Harter Act, enacted in 1893, has been superseded by COGSA for shipments between U.S. ports and foreign ports. In order to limit their liability, maritime carriers almost universally stipulate in their bills of lading that the COGSA liability regime shall apply in domestic carriage.<sup>7</sup> Absent such a stipulation, the unlimited liability of the Harter Act applies. The Harter Act governs prior to the time when the goods are loaded or after the time when they are discharged from the ship. Many maritime contracts of carriage stipulate that road transportation to and from maritime carriage shall be governed by the maritime liability regime.

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<sup>7</sup> Gilmore and Black, *Law of Admiralty*, 2d ed., at 148.

COGSA holds the carrier responsible for liability from loss or damage arising from the carrier's breach of duty to exercise due diligence, to provide a seaworthy vessel at the inception of the voyage, and to properly load, stow, carry, care for, discharge and deliver the goods entrusted to him for transportation. However, water carriers operating under COGSA have 17 defenses against loss and damage claims. When the COGSA limit is less than full value, for an additional charge an ocean carrier will provide the opportunity for the shipper to declare a higher liability value.

## **Air Carriers**

The liability of U.S. domestic air carriers with respect to loss, damage and delay of air freight has been deregulated. The air carriers are subject to liability regimes based on the air common carrier liability regime, *American Airlines v. Wolens*, 513 U.S. 219 (1995). Thus in domestic air carriage, air carriers are liable for loss and damage if caused by the negligence of the carrier or its agents occurring while the shipment is in their care, unless they can prove the loss or damage resulted from one of the five common law exceptions or that the carrier was free from negligence. The terms of liability, including limitation, are presented by the carrier to the shipper in the air waybill, and are contractually accepted when shipment is made on that air waybill.

Internationally, the Warsaw Convention of 1929, applicable to international air commerce, became effective for the United States in 1934. The Hague Protocol was adopted in 1955 as an amendment to the Warsaw Convention, but it has not been ratified by the United States. Most other nations have adopted this revision of the Warsaw Convention.

Under the Warsaw Convention, the air carrier is liable when loss or damage is caused by negligence. Here, the burden is on the carrier to prove that it was not negligent, tending to create a de facto strict liability regime. Liability is limited to \$20 per kilogram (approximately \$9.00 per U.S. pound). When the limitation is less than full value, for an additional charge, air carriers will provide the opportunity for the shipper to declare higher value. Furthermore, the liability limit is not applicable if the damage is caused by the willful misconduct of the carrier, or if the air waybill fails to contain essential information.

The Departments of State and Transportation, have urged that Congress give its advice and consent to ratification of the 1975 Montreal Protocol No. 4, dealing with air cargo transport liability. The Protocol does not affect the current \$20 per kilogram (\$9.07 per pound) limit of liability, but would make a major contribution in air cargo facilitation by electronic data transmission. It would eliminate several archaic requirements under the Warsaw Convention, particularly the requirement that a copy of the air waybill accompany the goods, and the requirement for completion of the air waybill before the carrier accepts the goods.

## **Indirect Common Carriers**

Under the ICCTA domestic surface freight forwarders assume the same liability for loss and damage as do rail and motor common carriers. A freight forwarder is considered to be both the receiving and the delivering carrier. Domestic air freight forwarders, also called indirect air carriers, are subject to DOT jurisdiction, but exempted from DOT regulations, 49 CFR Parts 296, 297. They tend to publish the same liability as the underlying air carriers. International air freight forwarders subject to DOT jurisdiction almost universally adopt the rules of liability of the Warsaw Convention. The Non-Vessel Operating Common Carrier by Water (NVOCC) is treated as an indirect common carrier by water in the foreign commerce of the United States. The NVOCC is generally subject to the same liability applicable to ocean carriers but assumes greater liability for movements between foreign ocean ports and foreign inland points.

### ***2.3 LIABILITY FOR CARGO TRANSPORTED BY MORE THAN ONE MODE***

Although it may appear that the transportation of cargo constitutes a continuous process, much U.S. domestic and most international cargo shipments utilize two or more transport modes. Legally each of these modes constitutes a distinct segment insofar as the contractual relationship with the cargo interest is concerned.

Intermodal transport is characterized as "through carriage," or "through transport." One of the participating modal carriers or freight forwarders often arranges for all transportation and related services from origin to destination. The parties to a contract of carriage may stipulate that the originating carrier's liability regime shall apply to the entire journey; otherwise the liability for such transport segment usually is governed by the liability regime applicable to the mode of carriage at the time of loss or damage. Thus, the shipper often is exposed to differences in liability regimes, even though the goods may be in through transport and governed by a through bill of lading. Concealed damage and identification of the point at which loss or damage occurred, are particular problems in intermodal carriage. These variations in modal liability regimes raise the issue of lack of uniformity.

When a U.S. domestic shipment is moved by different modes, the liability regime will vary as above. A typical international shipment is assuredly subject to diverse modes of carriage. For example, it might move from an inland U.S. point to a U.S. port by rail, then by ocean carrier to a European port of entry, and then by rail or motor carrier to an inland point located either in the country of entry or in another nation. This intermodal handling process presents widely varying combinations of carrier liabilities for individual shipments. Carrier liability while in the custody of U.S. rail carriers covers the full value of the cargo, unless the parties contract for lesser value; liability of the connecting water carrier (assuming operations under COGSA) is keyed to the carrier's fault; and the European motor or rail movement is governed by the CMR or CIM Convention, which is more strict than the COGSA regime of liability.

### ***2.4 UNIFORMITY IN LIABILITY REGIMES***

The preceding discussion emphasizes the many differences in the liability provisions of the modal laws and conventions applicable to the movement of cargo. Although these laws vary considerably in their strictness of application and in their limitation on liability, they all provide protection for intermodal shipments from non-concealed loss or damage for which a particular mode can be shown to be responsible.

A multimodal convention would create a liability regime governing the liability of the multimodal carrier or multimodal transport operator (MTO). The Multimodal Convention would create a bill of lading. Multimodal cargo would be governed by a liability regime that would fill the gaps among the existing modal transportation conventions and would apply when, for any reason, the law controlling liability in transportation is unknown, for example in case of concealed damage. The primary effect of such a multimodal convention would be that existing transportation regimes and insurance arrangements would be left undisturbed. The Multimodal Convention regime is treaty based and governs multimodal carriage from inland origin in one country to inland destination in another country. Participating countries have the option of adopting the regime as domestic law.

## ***2.5 LIMITATION ON LIABILITY***

Table 1 gives an overview of the current monetary limits of various U.S. domestic and international liability regimes. If, for example, the freight is shipped via motor carrier to a U.S. port, then by water to a European port, and finally by rail carrier to the destination, the liability limit in case of loss or damage is for full value or a lower contracted value while moving by United States motor carrier, \$500 per package while in the custody of the water carrier, and 8.33 SDRs per kilogram (approximately \$5.00 per U.S. pound ) while carried by a CIM rail carrier. In alternative intermodal channels, the shipment is subject to equally wide variations in the monetary liability limits of carriers.

**Table 1**  
**CARRIER LIABILITY VIA ALL MODES**

REGIME	HARTER ACT	C.O.G.S.A.	WARSAW	AIR CARGO	STAGGERS RAIL ACT	ICC TERMINATION ACT
MODE	WATER	WATER	INTL AIR	DOMESTIC AIR	RAIL	MOTOR
DATE	1893	1936	1929 (U.S. 1934)	1977	1980	1995
SCOPE OF APPLICATION	To or from U.S. ports	To or from U.S. ports in foreign trade	International	Domestic	Interstate & Foreign Commerce	Interstate & Foreign Commerce
PERIOD OF APPLICATION	From acceptance through delivery	From acceptance through delivery or release	From acceptance through delivery or release	From acceptance through delivery or release	From acceptance through delivery	From acceptance through delivery
CONTRACT OF CARRIAGE	Requires bill of lading	Requires bill of lading or common carrier relationship	Air waybill required if requested	No uniform contract	Uniform Straight bill of lading	Straight bill of lading (several versions)
CARRIER OBLIGATIONS	Must use due diligence to render vessel seaworthy; Proper loading, stowage, custody, care & proper delivery; Reasonable, non-discriminatory service to public	Due diligence to render vessel seaworthy before and at beginning of voyage; Reasonable care & custody of cargo; Reasonable, non-discriminatory service to public	Reasonable, non-discriminatory service to public	Reasonable, non-discriminatory service to public	Reasonable, non-discriminatory service to public	Reasonable, non-discriminatory service to public
BASIS OF LIABILITY	Where unseaworthiness present - presumed fault of carrier	On proof of fault of carrier	Presumed fault of carrier, but court may exonerate wholly or partly on finding claimant negligent	"Strict Accountability" (Presumed Fault Of Carrier)	Strict liability	Strict Liability
BURDEN OF PROOF	On carrier to disprove unseaworthiness; Otherwise on shipper	Shipper to prove fault unless seaworthiness in issue; Clean bill of lading is evidence of receipt; Carrier burden of proving seaworthiness	On carrier to prove that it took all necessary measures or that it was impossible to take such measures	On carrier	Carrier to prove that sole cause was one of bill of lading or common law exceptions	Carrier to prove that sole cause was one of bill of lading or common law exceptions
LIMITATIONS OF LIABILITY	NONE STATED "Reasonable" limitations upheld in courts	(\$5000US) per "package" or "customary freight unit" unless a higher value is declared; "customary freight unit" is used in U.S. only for goods not shipped in packages	\$20.00 per kilo (\$9.07/lb.); Willful misconduct voids all limitations of liability	None by law, but see tariffs and air waybill of individual carriers; Common law standard of "reasonableness" will apply	None, except released rates (including deductibles) and contract rates	None, except released rates declared value and contract rates.
EXEMPTIONS	Live animals	Live animals, and on-deck cargo except when deviation	None	None	Fresh produce, TOFC/COFC, Intrastate traffic	Agricultural commodities, cooperatives, commercial zone, air freight & intrastate traffic
DEFENSES	Upon proof of seaworthiness, errors of navigation or management, perils of the sea, act of God, act of public enemy, act of public authority, inherent vice of goods, improper packing, act or omission of shipper, deviation to save life or property at sea	⇒ 17 Defenses: Negligent navigation or management; Fire, unless carrier fault or privty; Perils of the sea; Seizures under legal process Quarantine restrictions ⇒ Act or omission of the shipper ⇒ Inherent vice of goods ⇒ Strikes & civil commotion ⇒ Latent defects not discoverable by due diligence ⇒ Any cause arising without fault of carrier, but burden of proof on carrier	⇒ Negligent piloting or navigation;	Common law defenses and defenses in air waybill	(a) Common law defenses: ⇒ Act of God; ⇒ Act of public authority; ⇒ Act of public enemy; ⇒ Inherent vice of goods; ⇒ Act or fault of shipper; (b) Bill of lading exceptions: ⇒ Strikes, riots, impossible highways & bridges, etc.;	(a) Common law defenses: ⇒ Act of God; ⇒ Act of public authority; ⇒ Act of public enemy; ⇒ Inherent vice of goods; ⇒ Act or fault of shipper; (b) Bill of lading exceptions: ⇒ Strikes, riots, impossible highways & bridges, etc.;
CARGO INSURANCE	None	Bill of lading must offer opportunity to insure at full value	None	Mandatory for air freight forwarders only; Must show limits on airbill; Airlines must also show limits on airbill if cargo insurance carried	None	Minimum prescribed by DOT (\$5,000 per vehicle, \$10,000 per occurrence)



## **CHAPTER 3. INSURANCE AND ITS USE**

### **3.1 GENERAL**

Three types of insurance are discussed in this study: cargo (shippers) insurance, carrier liability insurance, and self-insurance.

Cargo insurance is purchased by shippers and receivers for a number of reasons which are discussed in detail below. Although the shipper may obtain insurance policies tailored to his specific needs, the type of transportation insurance most commonly purchased is an "all-risk" policy. Coverage begins when transportation commences at the point of origin and continues until the goods are delivered at the destination.

Carrier liability insurance is purchased by motor carriers to protect against a number of risks including their liability for loss and damage to cargo.

Self-insurance is a term to describe a shipper's or carrier's own assumption of the risk of loss and damage in an attempt to lower its costs.

### **3.2 DOMESTIC SHIPMENTS**

When U.S. surface carriers assume responsibility for the full value of the goods, they are subject to a very high degree of responsibility for loss and damage because there are few defenses. In such cases the shipper perceives little need to purchase cargo insurance protection and looks to the carrier for indemnification. However, under the ICCTA, carriers may establish a lower limitation on liability by contract, or even by their unilateral decision. If a lower limitation on liability is established, the shipper can purchase extra protection through cargo insurance or choose to self-insure.

Motor carriers must show proof of minimum financial responsibility, for bodily injury and property damage, as a condition of registration under Sec. 13902 of title 49, United States Code. Under Sec. 13906, the Secretary of Transportation may register a motor carrier only if it files a bond, insurance policy or other type of approved security. The statute also specifically provides that: "The Secretary may require a registered motor carrier to file with the Secretary a type of security sufficient to pay a shipper or consignee for damage to property of the shipper or consignee placed in the possession of the motor carrier...." Brokers and freight forwarders may likewise be required to obtain insurance, bond or other type of security. DOT requires motor carriers to have insurance coverage for bodily injury and property damage liability for at least \$750,000. Motor carriers must also have cargo loss and damage liability coverage in the amount of \$5,000 per vehicle and \$10,000 per occurrence.

DOT requires notice of insurance cancellation, including cargo liability insurance, at least 30 days in advance of actual cancellation so that DOT may revoke the carrier's registration after the effective date of the insurance cancellation.

Motor carriers may apply to DOT for permission to self-insure to satisfy the statutory requirements.<sup>8</sup>

### **3.3 *INTERNATIONAL SHIPMENTS***

#### **Shippers**

To the extent that goods are covered by ocean or air cargo insurance the shipper, bank (if the bank holds title to the goods) and consignee are relieved of risk of loss or damage. Additionally, cargo insurance relieves the shipper of much concern over such things as exact cause or location of the loss, and the consequences of the shipper's inability to control movement of cargo in the event of strike, war or natural catastrophe. Cargo insurance can be obtained to protect the shipper's interest in the goods if the consignee agreed to, but failed to, place insurance, or refused to accept the goods.

Many other highly specialized arrangements are also possible. For example, if a loss occurs under an all-risk policy, the claimant, who might be a holder in due course of title documentation, need only prove that the loss occurred in transit and the amount of the loss. In this event the insurer controls the disposition of any claims for loss and damage.

#### **Carriers**

Carrier liability insurance coverage is adaptable to the needs and financial capabilities of the carrier. Smaller or less financially flexible carriers tend to have low deductibles and to rely on the loss adjustment facilities of the insurance company. As carriers grow in size, increasingly large deductibles are used.

Mexican carriers may apply for certificates of registration authorizing operations within the commercial zones of the U.S. border communities. These operations may be conducted under trip insurance, as opposed to continuous insurance coverage. The North American Free Trade Agreement (NAFTA) contemplates further phased easing of many restrictions on operations of Mexican carriers in the United States and by U.S. carriers in Mexico. NAFTA provides for the gradual removal of restrictions on the provisions of transportation services among the three NAFTA countries for carriage of international cargo. All foreign motor carriers operating in the United States must comply with the same Federal and State regulations that apply to U.S. carriers. Carriers applying for DOT authority to operate beyond the commercial zones along the U.S.-Mexico border will be required to show proof of continuous insurance coverage.

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<sup>8</sup> See 49 CFR 1043.5.

### ***3.4 CONSIDERATIONS INFLUENCING THE PURCHASE OF INSURANCE***

#### **Shippers' Transportation and Ocean Cargo Insurance**

Under the various legal regimes carriers are not always responsible for non-delivery or damage to the goods. Even if the carrier is fully liable, the shipper may not be able to recover the entire claim. Furthermore, the financial ability of the carrier may remain a risk.

Transportation and ocean cargo insurance not only transfers risk but also provides the convenience of payments to the insured upon proof of loss to the insurer. For some shippers it may also obviate or reduce the necessity for maintaining a claims recovery capability. Some shippers prefer to seek recovery from the carrier and to insure only the amount of loss and damage they choose not to absorb.

#### **Carriers' Liability Insurance**

The carrier may consider the following factors in determining how to choose to manage its risk:

- the size of the carrier, as measured by such factors as gross revenues, net current asset position, or net worth to total assets ratio;
- the loss experience of the carrier, as determined by the distribution and frequency of cargo claims by size, their predictability, and any identifiable trends;
- other issues relating to insurance and risk management, for example, the cash management policy of the carrier, the overall long term total costs of claims and insurance, the current quotations for insurance at different deductibles, and the costs of providing claims services in-house; and
- the legal regime under which it must operate, including the defenses to, and limitations on liability.

There is no direct link between the carrier's liability insurer and the shipper unless one is established by statute or regulation. For instance, pursuant to regulation,<sup>9</sup> a carrier's liability insurance contract requires that in the event of a motor carrier's bankruptcy, the liability insurer must pay all valid claims, including the deductible. In this case the claimant would clearly have the direct benefit of the carrier's liability policy.

### ***3.5 SELF-INSURANCE***

The term self-insurance applies to any of the following situations:

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<sup>9</sup> See 49 CFR 1043.

- The full assumption of the risk of loss, for any number of reasons. For example, when a shipper's favorable loss experience makes transportation insurance seem an unnecessary luxury;
- Internal funding earmarked to pay for expected losses;
- The partial assumption of the risk of loss through the use of insurance deductibles;
- The treatment of certain losses in retrospectively-rated plans of insurance;
- The assumption of those risks for which indemnity is available from sources other than insurance policies;
- The transfer of risks to a subsidiary corporation such as a captive insurance company; and
- The assumption of the risk of accidental failure to insure.

Shippers may freely decide to self-insure. Carriers' qualifications as self-insurers are subject to the scrutiny of the Federal Highway Administration (FHWA). FHWA will approve a self-insurance program only "if the carrier furnishes a true and accurate statement of its financial condition and other evidence that establishes to the satisfaction of the [FHWA] the ability of the motor carrier to satisfy its obligations for bodily injury liability, property damage liability, or cargo liability."<sup>10</sup> Any credible self-insurance program requires solid funding, as illustrated by the FHWA qualifications.

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<sup>10</sup> See 49 CFR 1043.5.

## CHAPTER 4. ANALYSIS OF LOSS AND DAMAGE COSTS

This chapter discusses costs of insurance administration and other costs to cover loss and damage to cargo. It also describes the value of cargo being transported and the cost of subrogation.

### **4.1 INSURANCE COSTS**

How much do shippers and carriers spend on insurance? From the discussion in the preceding chapter on insurance it appears to be in the interest of both shippers and carriers to reduce their exposure by spreading the risks of carriage through insurance. By purchase of insurance, or by self-insurance, the parties avoid the risk of catastrophic loss because the loss falls on the insurer or is spread by self-insurance. The insurer “steps into the shoes” of the insured and assumes the insured’s rights and liabilities. The insured is freed of the burden of a loss to the extent that the loss is covered by insurance. The question is: when shippers and carriers do insure, how much does such coverage cost?

#### **4.1.1 SHIPPERS’ INSURANCE COSTS**

The 1975 DOT Cargo Liability Study ascertained that U.S. domestic shippers generally do not insure their cargo.<sup>11</sup> Only 1.5 percent of cargo, measured by value, in domestic carriage was covered by cargo insurance. The cost of insurance for domestic shippers’ cargo loss and damage was determined to be 0.098 percent of the value of the goods.<sup>12</sup> In contrast, shippers covered 50 percent of international cargo by cargo insurance. The cost of insurance for international shippers’ loss and damage was determined to be almost 0.108 percent of value for exports and 0.348 percent of value for imports.<sup>13</sup>

In practice there are reasons why insurance coverage of domestic cargo differs from international cargo. One reason is that under domestic law shippers may contract for carriage and are sufficiently large to assume the risk of carriage as a business cost. Another reason for shippers not purchasing insurance for carriage under the Carmack Amendment was that, before the recent changes, cargo was either subject to the carriers’ assumption of full value responsibility; or alternatively ICC could approve limited liability or “released” rates, reflecting a reasonable relationship to the value of goods. The ICC’s supervision over loss and damage liability disappeared in 1994-95 with TIRRA and the ICCTA.

Under the new regime, carriers can continue to offer full value responsibility. However, they also can reduce their responsibility. Carriers other than household goods carriers, are now essentially free to limit their liability to any level they choose. Consequently, carriers now tend to offer low levels of liability, leaving most of the responsibility for loss and damage of the cargo on the

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<sup>11</sup> Table 8, at page 43.

<sup>12</sup> Table 17 at page 54.

<sup>13</sup> Tables 14 and 15 at pages 51-52.

shipper.<sup>14</sup> Shippers may, in response, bargain for increased carrier liability to the extent that they have bargaining leverage. Carriers must provide shippers with the rates and terms of carriage, including any reduced liability limits, but only if the shipper requests this information. Some shippers<sup>15</sup> claim that they often receive inadequate notice of such a contractual shift of liability to them. They complain that the carriers are imposing contractual terms without their knowledge, that they are receiving insufficient notice of low contractual liability limits. Carriers respond that the shipper may obtain this information from the carrier.<sup>16</sup>

Under the new regime, shippers either cover themselves with all-risk cargo insurance, purchase excess value insurance, or cover the risk by self-insurance. Some complain that they are surprised by the magnitude of the risk when loss, damage, or delay occurs. Judging from their complaints it appears that the new liability regime has not yet significantly changed shippers' past cargo insurance coverage practices, by causing them to buy more cargo insurance or to renegotiate explicit liability arrangements with carriers.

It is apparent from transportation literature and from materials submitted to DOT as part of this study that shippers, in particular some small and occasional shippers, are experiencing difficulty in adjusting to the new environment of loss and damage. They would like to revert to the regime in which carriers assumed the full risk of carriage.

Because of the statutory termination of the ICC and its oversight of cargo loss, damage and delay, this study examines the alternative of significant statutory change. Short of such a change, or possibly in conjunction with such a change, the shippers' way out may be to purchase cargo insurance on a much larger scale, possibly on the same scale that they currently purchase cargo insurance for international traffic. Or shippers may more actively negotiate more balanced liability agreements.

#### ***4.1.2 SHIPPERS' ADMINISTRATIVE COST OF LOSS AND DAMAGE***

Shippers' administrative costs are the costs associated with claims processing. They include costs associated with direct and indirect personnel, overhead, communication, litigation costs, outside legal consultation, and any other items that contribute to total loss and damage costs. The 1975 DOT study showed that administrative costs for shippers ranged from 0.006 percent of value of goods for manufacturers to 0.011 percent of the value of goods for retailers and wholesalers.<sup>17</sup>

#### ***4.1.3 SHIPPERS' NET LOSS AND DAMAGE COSTS***

Additionally shippers experience costs relating to loss and damage claims that are either filed with the carrier but are not paid, or which the shippers decide, for whatever reasons, not to file. These costs are referred to as "net loss and damage." The 1975 DOT study showed that domestic

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<sup>14</sup> Transportation Consumer Protection Council (TCPC) statement dated Feb. 26, 1996.

<sup>15</sup> Id.

<sup>16</sup> American Trucking Associations, Inc. (ATA) comments dated July 3, 1997.

<sup>17</sup> See Appendix 3

shippers' net loss and damage costs constituted 0.013 percent of the value of manufacturers' goods, and constituted 0.040 percent of the value of retailers-wholesalers' goods.<sup>18</sup>

#### ***4.1.4 SUMMARY OF SHIPPERS' LOSS AND DAMAGE COSTS***

The 1975 DOT study reported that domestic manufacturers' loss and damage cost experience was a total of 0.028 percent of the value of goods.<sup>19</sup> Domestic retailers-wholesalers' loss and damages were a total of 0.17 percent of the value of goods. No significant information was submitted by shippers in response to DOT requests for comments, to indicate that these factors have changed materially since 1975. In summary, it appears that the loss and damage costs for shipper interests are a very small percentage of the value of the goods.

#### ***4.1.5 CARRIERS' COST OF INSURANCE***

Carriers' insurance costs include liability insurance premiums, payments made directly to shippers for loss and damage, and associated legal and administrative costs. These amounts are included as part of the cost base used to establish freight rates.

To a limited extent, motor carriers are required to protect against loss and damage to the cargo. 49 USC 13906 requires a motor carrier to demonstrate insurance coverage or other type of financial security in order to obtain a registration certificate from DOT. However, from a business point of view, DOT-required insurance limits often constitute insufficient protection for the carriers. Carriers need, and most obtain, more than the Government required insurance to spread the risk of carriage, thus avoiding overexposure to catastrophic losses.

The 1975 DOT cargo liability study reported that the net claims paid by motor carriers constituted 1.12 percent of the carriers' operating revenue.<sup>20</sup> Efforts to obtain comparable 1996 or other recent data were unsuccessful. However, the 1975 report is in line with 1992 National Freight Claims & Security Council (NFC&SC) motor carrier data<sup>21</sup> stating that claims paid constituted about 1.1 percent of carriers' operating revenue in that year. If loss and damage costs are that low, the benefits of any changes in risk allocation and thus in insurance coverage may be in areas other than cost savings. For example, it may be in the area of safety because increased allocation of transportation risk causes the party responsible for that risk to be more careful; or the benefit may be in the area of trade facilitation because greater certainty about the allocation of transportation risk may encourage (small) manufacturers to ship their goods to remote markets. Other benefits are accurate determination of risk of carriage for insurers, predictability, certainty of the law, and greater ease of legal practice.

In 1975 the net costs of the insurance system constituted 0.20 percent of the motor carriers' operating revenues. Thus, the total liability costs of U.S. motor carriers constituted, on average,

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<sup>18</sup> See Appendix 3

<sup>19</sup> See Appendix 3.

<sup>20</sup> See Appendix 4

<sup>21</sup> Submitted by Transportation Solutions, Inc. (TSI) dated Nov. 14, 1996.

1.32 percent of operating revenue.<sup>22</sup> Because the 1975 claims ratio is in line with the aforementioned 1992 claims ratio, it may be estimated that the current costs of the insurance system are also comparable; that is, approximately 0.20 percent of the motor carriers' operating revenue. This estimate is further supported by the fact that carriers' risk exposure has declined somewhat since 1975 because carriers are now legally able to limit liability to any level they choose; it is likely that insurance cost as a share of revenues has decreased, rather than increased. It is also relevant to note that, according to 1995 data, from *Financial and Operating Statistics* published by ATA, carriers costs of property loss and damage insurance approximated one percent of operating revenue for all carriers, except household goods carriers.

Our conclusion is that the cost of cargo liability insurance is a very small percentage of operating revenue. From that it follows that a small change in the costs of carriers' insurance would constitute a very small percentage of operating revenue. Thus, increasing or decreasing a carrier's insurance coverage to assume a greater or lesser share of the risk would have a negligible impact on revenue.

#### ***4.1.6 CARRIERS' ADMINISTRATIVE COSTS OF LOSS AND DAMAGE***

Carriers' administrative costs for cargo loss and damage liability include costs of management, supervisory personnel, staff claim representatives and overhead for cargo claims control, payment and handling. The 1975 DOT study estimated that motor carriers' costs for administration were 0.48 percent of operating revenue for all common and contract motor carriers.<sup>23</sup> However, this figure reflects administration of all types of loss management, not only liability for loss and damage to cargo, but also bodily injury and property damage, and fire and workers compensation. Here too, we have received no current data from carriers, but believe that this ratio has probably not changed significantly.

#### ***4.1.7 SUMMARY OF CARRIERS' LOSS AND DAMAGE COSTS***

There is no indication that the available evidence cited from 1975 is outdated in 1997. One reason may be that the loss and damage cost estimates are expressed in percentage of total value and that costs may have increased commensurate with increases in value of goods. The percentage of total value of goods spent on loss and damage generally is very small and generally has changed so little that conclusions may not have changed. The 1975 DOT study concluded that U.S. motor carriers' liability costs constituted 1.32 percent of the motor carriers operating revenue.<sup>24</sup> This percentage approximates the 1992 NFC&SC<sup>25</sup>--claim survey which found that the total claims constituted 1.1 percent of revenues. Loss and damage claims are not a significant percentage either of the value of the goods or of operating costs. On the other hand some carriers operate on thin margins and a small increase in operating costs could have a significant impact on profits. This leads to consideration of how much attention to give to this issue if it is a small cost factor.

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<sup>22</sup> See Appendix 4.

<sup>23</sup> 1975 DOT study at page 79.

<sup>24</sup> DOT Study Table 35 at page 80, see appendix 4; the cost of claims was 1.12 percent of cargo value and net cost of insurance was 0.20 percent of cargo value.

<sup>25</sup> Submitted by TSI dated Nov. 14, 1996.



## **4.2 LIMITATION OF LIABILITY**

This report examines limitation of liability because the ICCTA specifically required DOT to study whether any reform should be made in those loss and damage provisions related to limitation of liability by carriers. Carrier commenters have raised the issue of reallocating the risk of motor carriage by establishing a monetary limit.<sup>26</sup> There is considerable practical experience with a liability regime based on such a division. Under this approach claimants can still recover the full value of their lost or damaged goods, up to a predetermined limitation. However, above a stated monetary limitation the shipper assumes the risk of carriage. Without here evaluating their validity, commenters have mentioned several bases for a liability regime *with a limitation on recovery*.

### **4.2.1 ARGUMENTS FOR LIMITATION OF LIABILITY**

The initial argument is a quid pro quo, that is, a limitation on liability would enable a carrier to save money in purchasing insurance by not being exposed to risk of damages without a limitation. To the extent that the market for motor carrier transportation is competitive, carriers would pass some of that savings on to customers in the form of reduced freight rates.

DOT interviews with insurers<sup>27</sup> indicate that they like to know the extent of their risk exposure and that a clearer definition of the risk could influence premiums. When uncertain about the size of the risk being insured, insurers have no other remedy except to charge higher premiums in order to cover themselves against unpleasant surprises. However, limited liability does not necessarily lead to reduction in overall insurance cost because any reduction in carriers' insurance cost would probably result in increased shippers' cargo insurance coverage.

It would be easier for lawyers to advise their clients about claims when the law is certain and predictable. Presumably that could be reflected in lower legal costs.

Uniformity of law facilitates continued expansion of commerce,<sup>28</sup> and thus the argument can be made that a uniform limited liability regime facilitates trade; shippers may feel more secure in shipping goods to distant locations when the law is known, and thus the recovery for loss and damages is more certain.

Another argument is that a liability limitation on the actual value of goods shipped assures placement of a share of the risk of carriage on both the shipper and the carrier, enough so that they will be careful in packing and transporting the goods.

A fixed statutory limitation rather than a full value standard, in the situations other than contractual rates, would take the place of the many "released" rate limitations authorized by ICC when it was in existence. The sunset of ICC has changed the entire practice of released rates because a

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<sup>26</sup> ATA comments dated July 3, 1997.

<sup>27</sup> Meeting in May 1996.

<sup>28</sup> Uniform Commercial Code, Section 1-102.

regulatory agency no longer functions to ensure that released rate limitations are “reasonable” and does not maintain a public file. Carriers are now essentially free to limit their liability to any level they choose.

A single statutory limitation would bring domestic motor carriage of cargo closer into line with the motor carriage of the rest of the world and with certain other modes of transportation.

If a U.S. limitation on motor carriage of cargo were to be considered, its effects would have to be analyzed. Certainly it would have to have some relevance to the value of the goods being transported and to how high a percentage of value should be compensated. For example, in Canadian motor carriage, liability is generally limited to 2.00 Canadian dollars per pound (about U.S. \$1.50 per pound). The amount of this limitation has not been revised in recent years. Liability in Mexican motor carriage is limited to approximately \$0.03 a pound. While these two countries are examples which limit liability for motor carriage, the size of their limitation is too low for consideration by the United States.

Historically, common carriage was based on recovery of the full value of goods lost or damaged. That principle was codified in Carmack, albeit with the qualification that lower limits could be established through ICC approved “released” rates. A U.S. limitation enabling shippers to receive full compensation for the vast majority of goods shipped would be consonant with the law of common carriage and Carmack.

#### ***4.2.2. CARGO OF EXTRAORDINARY VALUE***

Cargo of extraordinarily high value falls into a special category of risk which carriers do not carry routinely, and which both the carriers and shippers would normally expect to be handled with extraordinary care. Another aspect is that all costs of transportation are reflected in the price charged. It is not fair to shippers of ordinary cargo to be charged for the cost of the lost or damaged cargo of extraordinarily high value of other shippers.

Consequently, it is relevant to study the value of shipments carried by motor carriage of cargo. DOT received information from two sources regarding the value of motor carrier shipments. They are sufficiently similar to illustrate the concept of a limitation which would cover the vast majority of cargo at virtually full value for loss and damage.

According to comments submitted by Transportation Solutions, Inc. (TSI), the National Freight Claims and Security Council of the American Trucking Associations (ATA) conducted a survey (1986) of the value per pound of freight carried. The purpose of the survey was to ascertain the monetary level at which various percentages of freight would automatically move under full value liability coverage. The stated objective was a liability system like the European CMR liability regime which would set a monetary limitation for automatic liability coverage.

Two versions of this survey are relevant. The 1986 survey indicated that if the limited liability dollar figure had been set at \$2.00 per pound, 55 percent of the cargo would have been transported at full value. If the figure had been set at \$3.00, 71 percent would have been carried at

full value; and if the limitation had been set at \$5.00, 85 percent would have been carried at full value.

The same survey was adjusted for the Producer Price Index for Finished Goods (PPI) and brought up to 1996; 42 percent of cargo would be carried at full value if the limitation were \$2.00 per pound, 59 percent would be carried at full value if the limitation were \$3.00 per pound, 77 percent of the cargo would be carried at full value if the limitation were \$5.00; 93 percent of the cargo would be carried at full value if the limitation were set at \$10.00 per pound.

A similar value of freight survey submitted directly by ATA in 1996<sup>29</sup> comes to a similar conclusion. This survey is more limited than the 1986 survey and differently formulated. However, it indicates that if the limitation were \$5.00 per pound, 74 percent of goods carried as less-than-truckload (LTL) would be transported at full value; regarding truckload (TL) shipments, 87 percent would be subject to full value. If the limitation were \$10.00 per pound, 89 percent of the goods carried in LTL would be transported at full value; and 96 percent carried as TL would be carried at full value.<sup>30</sup>

In addition, DOT generated a comparison of traffic based upon the 1993 Commodity Flow Survey of the Census of Transportation. This does not provide number of shipments, but does provide weight in tons and value in millions of dollars. The result is generally comparable to the other data submitted in that the preponderance of traffic is valued at less than \$5 per pound. See comparison of the three surveys summarized in *Value of Shipments*, Table 2.

Several consequences of a statutory limitation on liability need to be pointed out. In regard to the current use of value classification of cargo for the purpose of limiting liability by released rates the value rating or classification of individual categories of cargo could be eliminated. Because freight rates are established more and more on a unilateral basis by individual carriers, shippers may benefit from the openness and predictability of one uniform limitation. Furthermore, if the limitation were close to full value of all cargoes, it would function as full value compensation for virtually all shippers.

The insurance consequences of a uniform limitation may be favorable to carriers and shippers. Both may be able to purchase insurance at lower rates, because both would benefit by removal of the extraordinarily high value cargo from the transportation cost of ordinary carriage. It may safely be expected that such valuable cargo will be handled differently, anyway. Finally, the carriers' pressure on shippers to disclose the value of cargo would significantly decrease if not disappear, because there would be no need for that kind of information on ordinary cargo. There would be great economic pressure on both shippers and carriers to carefully package and handle the goods (see description of subrogation of claims under the CMR Convention below).

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<sup>29</sup> Comments dated July 26, 1996.

<sup>30</sup> Shippers disagreed with this relationship, but did not provide data to the contrary; see TCPC comments dated July 2, 1997.

The carriers and shippers are far apart regarding a possible limitation on liability. The carriers favor a liability standard of approximately \$2.50 per pound, per package.<sup>31</sup> The shippers prefer unlimited liability, but could live with a limitation of approximately \$50 per pound.<sup>32</sup> Furthermore, shippers want a limitation linked to the entire shipment weight with the ability to break the limitation in cases of carriers' intentional torts. Recognizing the widely divergent views, before a uniform limitation could be prepared, a detailed, rigorous independent study of cargo valuations would have to be conducted. Such a study is beyond the scope of this report.

#### ***4.3. SUBROGATION OF CLAIMS***

Carriers normally acquire insurance in the form of liability insurance or they qualify for self insurance. Some motor carrier shippers obtain cargo insurance, although not as often as in other modes of transportation. A significant amount of cargo risk is not covered by cargo insurance. When both carriers and shippers are insured, cargo claims tend to be settled among their insurers. If claims are litigated, the litigation will be among insurance companies that have become subrogated to the losses of their customers. Subrogation is the act of substituting one creditor for another, that is, the cargo insurer succeeds to the rights of the shipper in the authority to collect from the carrier on loss and damage claims, after having indemnified the shipper pursuant to the cargo insurance coverage.

In subrogation of claims the 1975 DOT cargo liability study ascertained,<sup>33</sup> and DOT staff has more recently verified (meeting with insurers in 1996), that maritime cargo insurers recover from carriers' insurers approximately 20 percent of the claims paid to insured shippers.

No information is available regarding subrogation recovery in U.S. motor carrier liability. One reason for the scarcity of information is that, as noted earlier, shippers often do not purchase cargo insurance. Thus, insurance companies do not have significant statistical information. The European subrogation experience under the CMR liability regime shows that both shippers and carriers tend to buy insurance coverage. In these settlements the insurers recover, in their recourse actions, about 25 percent of their loss. Consequently, cargo insurers assume responsibility for about 75 percent of the risk of loss, damage and delay, the cost of which they pass on to their customers, the shippers.

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<sup>31</sup> ATA comments dated July 3, 1997.

<sup>32</sup> NASSTRAC comments dated July 3, 1997, citing TCPC comments dated Feb. 14, 1996.

<sup>33</sup> At page 87, based on information from the American Institute of Marine Underwriters.

Table 2  
VALUE OF SHIPMENTS  
FREQUENCY OF SHIPMENTS BY VALUE RANGE  
TRUCKLOAD AND LESS-THAN-TRUCKLOAD

VALUE RANGE	<\$2.50	\$2.50-\$5.00	\$5.01-\$7.50	\$7.51-\$10.00	\$10.01-\$15.00	\$15.01-\$20.00	\$20.01-\$25.00	>\$25.00
<i>ATA PROPOSAL</i>								
No. of LTL Shipments	3,312	1,944	701	386	310	139	72	258
% of LTL Shipments	46.50	27.30	9.84	5.42	4.35	1.95	1.01	3.62
LTL Cum. Percent	46.50	73.80	83.64	89.06	93.41	95.37	96.38	100.00
No. of TL Shipments	204	36	16	8	5	3	0	3
% of TL Shipments	74.18	13.09	5.82	2.91	1.82	1.09	0.00	1.09
TL Cum. Percent	74.18	87.27	93.09	96.00	97.82	98.91	98.91	100.00
<i>TSI, Inc.</i>								
No. of TL/LTL Shipments	6,395		1,169			670		
% of TL/LTL Shipments	77.0		16.0			8.0		
TL/LTL Cum. Percent	77.0		93.0			100.0		
<i>USDOT (1993 CENSUS)</i>								
Tons (OOO)	927,012		15,466			15,183		
Total Tons Cum. Percent	96.7		98.3			99.9		
Value \$(Millions)	1,550,363		216,259			413,381		
Total Value Cum. Percent	69.2		78.9			96.9		

## CHAPTER 5. CURRENT ISSUES IN CARGO LIABILITY

### 5.1. GENERAL

The primary framework for discussion of issues in this chapter will be the factors and criteria which the ICCTA requires the Secretary of Transportation to consider for this study of cargo liability. They are:

- a. Efficient delivery of transportation services
- b. International harmony
- c. Intermodal harmony
- d. The public interest
- e. The interests of carriers, and
- f. The interests of shippers.
- g. Limitation of liability (Particular emphasis was given to this criterion, which will be discussed in the context of the liability regime).

Basically, a cargo liability regime is a method for allocating the risk of carriage. In theory, the entire risk of carriage could exclusively be allocated either to the carrier or the shipper. In practice, such a unilateral risk allocation would remove the incentive for the shipper or carrier to be careful in handling the goods. Such unilateral risk allocation is neither good tort law nor is it in the public interest. Consequently, it is the view of DOT that both shippers and carriers should bear a burden of responsibility that provides incentive for and is in accord with their self interest in careful and successful completion of transportation, without loss, damage, or delay.

We begin by assuming that the risk will be substantially shared by identifying individual parts within the total bundle of elements constituting cost, to determine how those elements can be divided up. It is important to understand how each part within the bundle affects the other parts. For example, the carrier could be made liable, with few defenses to liability; but if there were a very low limit of liability, the consequence would be to allocate almost the entire risk of carriage to the shipper. The same result would occur if the liability were high but accompanied by many defenses to liability. Thus, there are several 'levers' which can be moved up or down to effect a strict, weak, or medium liability regime (see chart below).

VARIABLES IN A LIABILITY REGIME

NUMBER OF DEFENSES	LIABILITY LIMIT	INTENTIONAL TORTS ESCAPE VALVE	LIABILITY LIMIT PER PACKAGE OR SHIPMENT	SHIPPER/CARRIER COMPARATIVE LIABILITY
NONE/FEW	NONE/HIGH	NO	SHIPMENT	YES
MEDIUM	MEDIUM	WEAK	OTHER FORMULA	OTHER FORMULA
MANY	LOW	YES	PACKAGE	NO

For example, a greater share of the risk of carriage could be allocated to shippers by adopting a comparative liability regime. Likewise, a greater share of the risk could be allocated to carriers if they gave up their virtual freedom to limit their liability to any level they choose, and instead accepted a fixed liability limitation. There are many ways that carriers and shippers can modify the impact of any policy. For example there could be an escape valve allowing shippers to exceed the fixed limit in case of loss, damage or delay caused intentionally by the carriers. If a liability limit is adopted, that limit could be linked to the weight of the entire shipment or to the individual package within the entire shipment (the weight of the individual package would tend to be less and therefore compensation would be lower). Finally the carriers' defenses to liability could be reduced, thereby shifting a greater percentage of the risk from the shipper to the carrier; or the defenses could be enlarged, thereby shifting more of the risk to the shipper.<sup>34</sup>

Several commenters have suggested that a median liability limitation would establish a 50/50 sharing of the risk of carriage.<sup>35</sup> That disregards all the other ways in which risk of carriage can be and is currently allocated. For example, considerable risk is assumed by the shippers who simply absorb losses for whatever reasons; that is, the shipper may not consider the claim worth the legal costs involved in pursuing the claim. Secondly, the shipper's claim may be rejected by the carrier because it is subject to one of the five carrier defenses. Thirdly the shipper may stipulate by contract to absorb damages. Fourthly, the shipper may have purchased cargo insurance and the carrier may settle the claim at less than full recovery for reasons that the shipper does not care to know about, because the insurer has already paid the shipper in full.

All these illustrations of risk allocation also show that full value recovery presently provided by the Carmack Amendment does not result in 100 percent risk allocation to the carrier. The real risk allocation may be more like the 25/75 ratio currently in effect in European shipper-carrier insurance subrogation.<sup>36</sup>

The ICCTA requires the Secretary of Transportation, in conducting the cargo liability study, to consider the efficient delivery of transportation services.

An efficient legal regime would be a regime in which the costs of loss and damage, and indeed of transportation, are as low as possible. The preceding chapter discussed the costs of loss and damage. While efficiency also means a regime in which cargo is transported safely and expeditiously to its destination, this discussion will primarily focus on an efficient liability regime.

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<sup>34</sup> Note that there are 17 defenses to liability in maritime carriage.

<sup>35</sup> ATA comments dated July 3, 1997.

<sup>36</sup> See TCPC comment discussion dated July 2, 1997

### **5.1.1. EFFICIENT LIABILITY REGIME**

The risks of motor carriage are allocated to carriers and shippers through the liability regime, as stated in 49 USC 14706(a)(1). The statute currently provides that "the liability... is for the actual loss or injury to the property caused..." In other words the standard of liability is strict liability of carriers to the shipper for motor carriage. It is qualified by defenses as discussed below.

### **5.1.2. FIVE DEFENSES TO LIABILITY**

The U.S. Supreme Court case of Missouri Pacific RR Co. v. Elmore & Stahl, 377 U.S. 134 (1964), held that the Act codifies the common law that a carrier is liable for the cargo transported, unless the carrier can prove that the loss or damage was caused by any of the following five defenses:

**(a) Act of God:** This defense is defined as an event which occurred without intervention of a human being or one that could not be prevented by exercise of human care. Lightning would be an example of a Act of God. The carrier would remain liable if its negligence mingled with the Act of God.<sup>37</sup> Because an Act of God is outside the influence of either the carrier or the shipper, any change in this defense would not affect safety or efficiency of carriage. Thus this study does not recommend a change to the defense.

**b) Act of the Public Enemy:** The defense known as "act of public enemy" involves an event which is outside the influence of either the carrier or the shipper. This defense may be invoked if loss, damage or delay is caused by an enemy military force. No change in safety or efficiency would occur by a change in this defense. Consequently no change is recommended.

**(c) Act of the Shipper Himself:** This defense may be invoked by the carrier if the shipper fails to pack or load the freight properly. The carrier must prove that the shipper's act was the sole cause of the loss or damage and that the carrier was not contributorily negligent. The test is: what is the cause of the loss or damage? Only if the shipper's negligence was the sole cause of the loss and damage does the carrier escape liability.<sup>38</sup>

Comparative negligence, that is, apportioning damages to the parties in proportion to their degree of negligence, currently is not applied by U.S. courts to motor carriage. However, comparative negligence is applied in the law of maritime transportation and is increasingly being applied in U.S. law of torts.<sup>39</sup> Modern international transportation liability regimes also have tended to adopt comparative negligence. For examples, see the CMR Convention on European motor carriage, Article 17(5), and the Hamburg Rules on Carriage of Goods by Sea, Article 5.

The current motor carrier liability regime of contributory negligence causes a hardship because it places on the carrier the entire burden of loss in those cases where both the carrier and shipper are

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<sup>37</sup> See 13 CJS Carriers § 80, at page 159.

<sup>38</sup> See Elmore & Stahl, *supra*, at 141.

<sup>39</sup> See Prosser, Law of Torts, 4th ed. 433-439.



at fault. For example, the carrier's deviation from an agreed route might be slight, and the shipper's bad packaging may be by far the more significant cause of the damage; however, the shipper goes free of liability for its own negligence. This may neither be fair nor efficient.

**(d) Act of a Public Authority:** This defense may be used, for example, if public authorities, such as the police, seize the cargo as evidence in a criminal prosecution. This defense is rarely invoked.

**(e) Loss or Damage by Inherent Vice or Nature of the Goods:** Missouri Pacific RR Co. v. Elmore and Stahl, 377 U.S. 134, 136 (1964) explains the defense of inherent vice as being based on "existing defects, diseases, decay or the inherent nature of the commodity which will cause it to deteriorate with a lapse of time." The U.S. Supreme Court found in Elmore & Stahl that the deterioration of melons being transported was caused by a combination of inherent vice and negligence. The Supreme Court found that because the carrier was not able to prove the absence of carrier negligence, the carrier was liable. If comparative negligence had been applicable, the compensation would have been shared according to the extent of the carrier's and shipper's negligence or inherent vice. But under the present interpretation of liability, the carrier was held wholly responsible.

In sum, for a prima facie case of carrier liability, the shipper merely needs to show that it delivered the goods to the carrier in good condition, that the goods arrived at their destination in damaged condition, and the amount of the damages. Then the burden is on the carrier to prove itself not negligent, in that one of the five defenses to liability indicated above can be invoked.<sup>40</sup>

The Supreme Court explained in Elmore & Stahl that the law of liability is based on the premise that the carrier is in possession of the goods during transportation and thus has peculiar knowledge of the facts and circumstances concerning the loss or damage. For that reason the law places on the carrier the burden of responsibility for that loss and damage which the carrier cannot explain as being encompassed by one of the five defenses to liability.

### **5.1.3. LIABILITY LIMITATION**

#### **Notice of Liability Limit**

49 U.S.C. 14706 specifically requires examination of liability limitation for loss, damage and delay. Originally it was considered contrary to public policy to permit the carrier to contract out of liability. That changed with the Motor Carrier Act of 1935, which codified motor carriage liability in the Interstate Commerce Act. In that codification, carriers were given the legal right to seek release from unlimited liability and were permitted to file released rates with ICC. Released rates in effect provided the possibility of a limitation on liability. In approving a released rate, the Interstate Commerce Act required that ICC determine whether the proposed released rate was reasonable under the circumstances surrounding the transportation. Further, ICC required (1) that the carrier file the rate, and keep it on file; (2) that the shipper be presented a choice between two or more levels of liability; and (3) that the carrier issue a receipt or bill of lading agreeing to full value or the lower-than-full-value limitation in the released rate. The reason for keeping the

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<sup>40</sup> Elmore & Stahl, *supra*, at 137, 138.

released rate on file with ICC was to give shippers at least constructive notice (constructive notice means that they can be legally presumed to know the required filing regardless of whether they actually know) of the applicable released rate. The reasoning is that through the filing the shipper would either know, or should know, the rate. Shippers' knowledge of the liability limit would be presumed from the ICC filing.

Conceptually, released rate filing changed with adoption of TIRRA, because TIRRA eliminated the requirement for filing individually made rates. After adoption of TIRRA, these released rates were not accessible at the ICC because they were no longer kept on file. Further change occurred when the ICC itself was eliminated by the ICCTA, ending ICC oversight of the reasonableness of lower-than-full-value released rates. Congress did not specifically transfer this function to either STB or DOT, and thus the administrative review of rate reasonableness lapsed.

Since enactment of TIRRA and ICCTA, shippers have complained about not knowing the limits of liability established by motor carriers. Sec. 10706 of title 49, United States Code, provides that, "upon request of the shipper," the carrier shall provide written or electronic notice of the rate, classification, rules, and practices on which the applicable price for the carriage is based. The nature of notice was altered. As a result, shippers can no longer be presumed to know the rate which the carriers maintain in their own filing systems, even when that system is open to the shippers upon request. The legal significance is that shippers can no longer be charged with constructive notice of the limitation. The shippers' ability to participate in establishing a reasonable limitation was weakened when rate filing with ICC disappeared. Moreover, the independent arbitration of reasonableness which had been available through ICC disappeared. The carriers are now more or less free to limit their liability to any level they choose.

At the present time, shippers are able to receive full value recovery for cargo loss, damage, or delay, but at a higher price than the rate charged under the reduced liability limitation established by the carriers for a particular kind of cargo. If shippers do not pay for the higher cost of full value recovery, they are subject to (sometimes very) low limits on liability established by carriers. Furthermore, information about the new rate filing system on liability limits now originates with the carriers, not with a regulatory agency, further undermining the legal presumption of knowledge. It is noteworthy that some courts have determined in a series of cases that contracts on liability limitation are not in fact consensual agreements, because such contracts tend to be "adhesion contracts" in which "the shipper has little choice but to accept carriers' terms."<sup>41</sup> However this legal assumption does not apply to all cases. For example, large shippers, as opposed to small shippers, tend to negotiate rate as well as liability levels. This is the reason why much contract carriage is not governed by section 14706.

The new system in effect after enactment of TIRRA and ICCTA is conducive to disputes and to litigation. The presumption of notice of the limitation (by "constructive notice") had its basis in the statutory requirement of filing with ICC. However, in the absence of constructive notice of the

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<sup>41</sup> See U.S. v. Atlantic Mutual, 343 U.S. 236,244 (1951); Fine Foliage of Florida v. Bowman Transport, 698 F. Supp 1566, (MD , Fla. 1988), affirmed 901 F. 2d 1034 (11th Cir. 1990).

information in the public file of a regulatory agency, the shipper does not have a significant choice between the full value recovery and a lower liability recovery based on a cheaper rate.<sup>42</sup>

Comparison could be made to rail service where there is no filing of released rates and liability is regulated by contract whether the freight is moving under contract or tariff. However, rail carriage is for many reasons different from motor carriage. Congress accepted this difference in the Staggers Rail Act of 1980, which provided freedom from ICC oversight of rate reasonableness for a substantial portion of rail transportation; but Congress retained ICC oversight of reasonableness over motor carrier released rates in the Motor Carrier Act of 1980.

For Sec. 14706 carriage the current situation creates uncertainty regarding liability limitations because neither the shipper nor carrier focus on the limitation at the time of shipment. Ambiguity about liability can be caused by the shipper failing to notice the small print on the back of the bill of lading warning of a low limitation. Shippers often indicate full value coverage on the front of the bill of lading, while the carrier's preprinted bill states on the back side that regardless of any shipper statements to the contrary, the carrier will only be responsible up to the limitation described directly or incorporated by reference on the bill of lading. This situation is illustrated by Bio-Lab v. Pony Express, 911 F.2d 1580 (11th Cir. 1990) in which the court found that the shipper had stated full value coverage of the cargo on the front side of the bill of lading and did not have actual knowledge of the carrier's statement on the back side limiting liability. The appellate court held in favor of the shipper.

As a result of TIRRA and ICCTA, shippers claim that they are now left in legal uncertainty. Uncertainty is conducive to litigation. That is an inefficient way of transacting transportation agreements. Shippers require notice of the applicable liability regime and limits to the carrier's liability; only actual notice will suffice. It is neither efficient nor a good business practice to incorporate by reference in the bill of lading a limitation to liability, the terms of which are located only in the carrier's file.

Actual notice may necessitate sufficient large type on the front of the bill of lading, with space for acknowledgment by the shipper. Additional notices in the area where the transaction takes place may also be required. A statutory notice solution, such as that provided by COGSA, or in international air carriage may be necessary. Such a solution would not require Government regulation. It could be regulated privately by uniform conditions of carriage (for example the conditions of carriage of the International Air Transport Association). A regulatory solution would require regulatory involvement by either STB or DOT. The clear Congressional intent in ICCTA was to limit government involvement in regulation.

### **Operation of a Limitation on Liability**

Liability regimes which operate with a limitation on liability have as their objective not only to allocate the risk of carriage but also to establish more uniformity of the terms of carriage. For

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<sup>42</sup> Motor carriers of passengers, pursuant to 49 CFR 1064, are required to notify passengers of the limitation of liability for loss or damage to checked baggage. See comments of the American Bus Association dated July 2, 1997.

example, COGSA provides a limitation of \$500 per package; the Warsaw air waybill provides a limitation of \$20 per kilogram (about \$9 per U.S. pound); the European CMR Convention on road carriage establishes a limit of 8.33 SDRs per kilogram (approximately \$5 per U.S. pound). The European CIM convention on liability for rail carriage establishes a similar limitation. All these limits are fixed only on the downside, in the sense that the parties to a contract of carriage cannot enter into a valid agreement on limits lower than the treaty's specified amount. They can only enter into agreements on higher limits.

A uniform fixed limitation would have further effects. The parties would not have to classify the goods for liability purposes because the uniform fixed limitation itself would divide the risk of carriage. Carriers and shippers might wish to classify cargo for other reasons, for example to establish different prices for different kinds of cargo to establish their different propensities for loss, theft, and for all other factors in pricing transportation; classification could also have valuable use in contract carriage.

Neither air cargo nor maritime cargoes are classified as to value and they are illustrative for how motor cargo liability could be limited. These regimes also differentiate cargoes for the purpose of pricing transportation. For example maritime shipments of coal are priced differently from shipments of automobiles or computers. Thus, by eliminating the perceived need to classify cargo by value for the purpose of establishing released rates, motor carrier transportation would be freed of a burden which is a relic of ICC. Moreover, the shippers' complaint, that the carriers have been using classification--which is in the carriers' control--against them, would disappear.<sup>43</sup>

Finally, a fixed statutory liability limitation removes the need for government oversight because the courts would administer the liability limitation as they do now in maritime transportation, air carriage, and European rail and road carriage. The courts have considerable experience in deciding on liability limits, having dealt with such limits in other modes of transportation, and through other formal limitations (for example, statutes of limitation and court deadlines).

### **High Value Commodity Exception**

In principle, full value compensation is a desirable objective. However, actual full value compensation would have to cover loss of unusually high cost cargo such as gold, expensive computers, etc. Full value recovery for these exceptionally high value goods is cross-subsidized by the charges for freight of more moderate value, for which restitution is less expensive. Carriers purchase long term liability insurance, the cost of which is spread generally to all freight, regardless of value. The cost of self-insurance would be spread the same way.

In liability regimes with a limitation on compensation, such cross-subsidy is an economic subsidy between classes of shippers. In the deregulation debate, DOT has consistently opposed cross subsidy of one economic activity by another activity; for example, a successful air route should not be unduly used to cross subsidize a poor air route; instead, the passenger or the lucrative route should benefit directly in the form of reduced fares. Likewise in carriage of cargo, the very highest

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<sup>43</sup> Note DOT Report on the Functions of the ICC, July 1995, page 29, "DOT recommends that the surface transportation industry be made subject to the antitrust laws applicable to other industries."

value goods constitute an exceptional risk and owners of exceptional risks buy special insurance. A uniform liability limitation could be established which provides full value recovery for virtually all cargo, except for a relatively small volume of exceptionally high value cargo.

Only the most costly goods would require supplemental insurance for full value recovery. Such a limit, while providing most shippers full value recovery, would also provide carriers with a fixed limitation against which to insure. It would protect carriers from their greatest threat, the catastrophic loss. It would not cost shippers very much.

### **Periodic Adjustment of Limitations**

It is very important that a liability limitation be updated. One problem with placing a limitation on liability has been that the limitation becomes too low over time when it is not updated for inflation. The best example is the U.S. experience with the limitation of liability for air passenger carriage under the Warsaw Convention: participating countries were unable to agree on updating the limits established in 1929; therefore, the limits remained static and the courts have increasingly disregarded the convention limits. An automatic inflation clause would have avoided the problem.

Because ICC oversight of reasonableness of released rates is no longer available to update rates, another way of updating liability limitation for inflation would be needed. The most direct way of updating the limitation would be simply to adjust the limitation periodically in accordance with a prominent index of inflation such as the consumer price index (CPI). Many economic factors such as wages and benefits are regularly and automatically updated based on the CPI. The same could be done with limitation of liability.

Other possible ways of updating limits could involve some regulatory activity by the government. For example, adjustment of the limitation could be based on general increases in value of goods, costs of transportation, insurance, and factors closely related to transportation. However, any governmental involvement is inefficient in comparison with automatic CPI adjustment; furthermore, from a public policy point of view, any government process of routine adjustment of liability limitation is undesirable.

### **Liability Limitation by the Package or by the Shipment**

There is a significant difference in risk allocation based on whether the carrier's liability is based on the weight of the particular package actually lost or damaged, or whether it is based on the weight of the entire shipment. For example if a shipper ships a 5,000 pound shipment with a total value of \$25,000, the risk exposure would be a total of \$25,000. On the other hand if liability is measured by the package and within the shipment a 100 pound package with a value of \$500 is lost, then the carrier's total risk exposure is only \$500.

It may be argued that only that portion of the shipment which is actually lost or damaged matters. However, the individual package may be an important or even an indispensable part of the entire shipment. For example, if a computer is shipped in small packages for assembly at the point of destination, the loss of one important package may significantly affect the value of the entire

shipment. Thus it is important whether a liability limitation is measured by the package or by the shipment.

### **5.1.5. CARRIERS' INTENTIONAL DAMAGE TO CARGO**

It may appear improbable that a carrier would ever deliberately cause harm to a customer's cargo. That would be bad business practice and a sure way to lose customers. However, what appears to be improbable, is not always so. Cargo transportation has had considerable case law experience<sup>44</sup> with the principle that the carrier should not be permitted to limit liability in cases of intentional torts, that is, when the carrier intentionally causes loss, damage or delay to the goods. In air carriage, the Warsaw Convention, Article 25, states that air carriers shall not be permitted to limit liability if loss, damage or delay is caused by the carriers' willful misconduct. Maritime carriers may jettison cargo deliberately to save the ship. Furthermore they also have case law experience with willful misconduct. The so-called "Visby Rules" (maritime bill of lading) include a provision on intentional damage to cargo. When a maritime bill of lading is issued in a country which has adopted the Visby Rules, the carriage becomes subject to this law. The Visby Rules, Article 4(5), provide that:

Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability ... if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that the damage would probably result.

In the Matter of Tecomar, 765 F Supp. 1150 (DC N.Y., 1991) a U.S. District court denied limited liability to a maritime carrier. The Court used the extensive case law defining and interpreting willful misconduct in air carriage under the Warsaw Convention. The court determined that the carrier's actual knowledge of the willful misconduct was required. The Tecomar case fits that analysis in that the maritime operator deliberately concealed that the ship was unseaworthy. Thus, the court did not permit the operator to limit liability for cargo lost when the ship sank due to its unseaworthiness.

Forfeiture of limitation on liability in the event of willful misconduct is a well-recognized escape valve to limited liability. Whether such an escape valve should be established greatly depends on whether the limitation on liability is high or low (see chart on page 29 showing various levers). When a limitation is high enough to cover virtually all cargo carried, the escape valve would not come into use very often. If it is low there would be much pressure to break the limit. Finally, such an escape valve serves to deter intentional torts.

Punitive damages may be demanded by shippers in cases of intentional loss, damage, or delay. However, U.S. courts have held<sup>45</sup> that the willful misconduct provision of the Warsaw Convention precludes punitive damages. Only actual damages are permitted to be recovered in situations where the limitation is broken through proof of willful misconduct.

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<sup>44</sup> See 49 U.S.C.A. 40105 for extensive case law on this subject.

<sup>45</sup> Floyd v. Eastern, 499 U.S. 530(1991).

The utility of the intentional tort escape valve depends much on the way it is worded. If it is defined as requiring the carrier's actual knowledge of the intentional tort (for example, the court found that the operator deliberately concealed the unseaworthiness of the ship in Tecomar), then carriers should have little cause for objection to adoption of this legal principle, because intentional torts are just not good business practice.

#### ***5.1.6. TIME LIMITS FOR CLAIMS AND ACTIONS***

49 U.S.C. 14706(e), provides that “a carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing civil action against it under this section.” The time period for bringing civil action runs from the date when the carrier gives a claimant written notice that the carrier declines any part of a claim. These time limits are not out of line with time limits of other transportation liability regimes. For example, the Warsaw Convention, Article 29; the Athens Convention on maritime carriage of passengers, Article 16; and the Hamburg Rules, Article 20, all provide for a two year statute of limitations.

Consideration of efficiency and international harmony, as well as the ease of keeping the familiar time limitation, are arguments in favor of continuing the existing time limits. There are no strong arguments for changing the time limits.

## CHAPTER 6. BILL OF LADING ISSUES

Essentially the bill of lading is a receipt for the property evidencing that a contract has been concluded; it may be a contract of carriage. It may be subject to a master contract of carriage between the shipper and the carrier; otherwise, it may be the only contract. Motor carriage is subject to statutory bill of lading requirements in chapter 801 of title 49, United States Code. Section 80103 of title 49, United States Code, defines two kinds of bills of lading: negotiable or nonnegotiable. Negotiable bills of lading are made out to the order of a consignee and the carrier may only deliver the cargo to the person in possession of the original bill of lading. When a negotiable bill of lading is negotiated, the person to whom it is negotiated receives title to the goods, 49 U.S.C. 80105(a)(1).

In actual practice, negotiable bills of lading are virtually never used in U.S. motor carriage because transportation occurs too quickly to make negotiability feasible. Non-negotiable bills of lading are customarily used. They are commonly known as straight bills of lading; that is, they are not made out to the order of a person. They are consigned to a specific person. "A common carrier issuing a nonnegotiable bill of lading must put 'nonnegotiable' or 'not negotiable' on the bill" (49 U.S.C. 80103(b)(2)).

A straight bill of lading does not convey title to the shipment. The straight bill of lading is merely a receipt for the goods, stating the terms and conditions of carriage; it serves as evidence of the transaction. The U.S. Supreme Court has held that "[t]he bill of lading is the basic transportation contract between the shipper-consignor and the carrier; its terms and conditions bind the shipper and all connecting carriers;" see Southern Pacific Transportation Co. v. Commercial Metals Co., 456 U.S. 336, 342 (1982). Use of straight bills of lading in motor carriage is solidly established.<sup>46</sup>

More and more goods move by several modes, and many shippers and carriers would benefit from a multimodal bill of lading. The need for a multimodal bill of lading is caused by the legal differences between the bills of lading of the various modes of carriage. The international air waybill is governed by the Warsaw Convention; Articles 8 and 9 state the requirements. Failure to state essential documentary requirements in the air waybill results in forfeiture of the carrier's right to limit liability. The maritime bill of lading is governed by COGSA, which is specifically made subject to the Bill of Lading Act.

Bills of lading for rail and motor carriage are subject to the Interstate Commerce Act, as amended by the ICCTA. 49 U.S.C. 14706(a) provides that a motor carrier subject to the Act, "shall issue a receipt or bill of lading for property it receives for transportation," and further provides that "[f]ailure to issue a receipt or bill of lading does not affect the liability of a carrier."

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<sup>46</sup> See 49 CFR Part 1051 and 61 Fed. Reg. 54706.



## **6.1. NEED FOR BILL OF LADING UNIFORMITY**

Uniformity facilitates commerce, provides efficient delivery of transportation services, establishes harmony, and is in the public interest. These are the policy reasons for the statutory bill of lading requirements, the maritime bill of lading, the Warsaw air waybill, and the European (CMR) bill of lading.

The sunset of the ICC adversely impacted uniformity. When ICC regulatory oversight ended, both shippers and carriers began to change the bill of lading to their advantage. Currently, three different so-called “uniform” bills of lading are being offered; each is favorable to its authors. Carriers offer a bill of lading which they have prepared. The TCPC has prepared a “uniform” bill of lading for its members. NASSTRAC has also prepared a “uniform” bill of lading. These competing bills have promoted a lack of uniformity and legal confusion. Other groups, such as freight forwarders, are especially concerned,<sup>47</sup> and urge a single uniform bill be established. The freight forwarders, TCPC, and others urged DOT to study the possibility of one uniform bill of lading that would be impartial and uniform.

## **6.2 CONTENTS OF THE BILL OF LADING**

The National Motor Freight Classification Committee approved<sup>48</sup> the motor carrier bill of lading. The ICC acquiesced in Ex Parte 495 (1992). The front side of this bill of lading contains many of the required documentary details describing freight and transportation. The back side contains the terms and conditions of carriage.

When TIRRA eliminated tariff filing for individually-determined rates, and when the ICC sunsetted by the ICCTA, not only the filing requirement but also the place of filing disappeared; ICC oversight of rate reasonableness also disappeared. These changes drastically reduced the shipper’s notice of the requirements, terms, and conditions of the motor carrier bill of lading. Even more significantly, it reduced the shipper's ability to influence the bill of lading requirements, terms, and conditions.

In a limited fashion, the DOT Federal Highway Administration (FHWA) has begun to exercise jurisdiction in this area. On October 21, 1996, in 61 Fed Reg, 54706, at 54708, FHWA redesignated ICC regulations on Receipts and Bills of Lading in 49 CFR Part 1051 as 49 CFR Part 373, Subpart A. This part (Sec. 1051.1 now 373.101) states that the motor carrier shall issue receipts or bills of lading containing (a) names of consignor and consignee, (b) origin and destination points, (c) number of packages, (d) description of freight, and (e) weight, volume or measurement of freight (if applicable to the rating of that freight). This regulation (49 CFR 1051.2 now 373.103) incorporates expense bills, including the rate assessed and charges due. All documentation required are details that the parties normally would record.

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<sup>47</sup> Transportation Intermediaries Association comments dated Nov. 14, 1996.

<sup>48</sup> See 49 CFR 1051 and 61 Fed. Reg. 54706.

### **6.3 WHICH DOCUMENTATION DETAILS NEED TO BE UNIFORM?**

Some fundamental issues are raised by the above situation. All parties (shippers, carriers, insurers, freight forwarders, etc.) strongly wish to establish a uniform bill of lading within which all the terms are fairly stated.

With one exception, documentation details of the bill of lading are not in contention. Almost all of the details in a bill of lading are details that both carriers and shippers would normally expect to provide because these details establish more certainty about the transportation. However, shippers have objected to providing information about the exact value of the cargo being shipped. Shippers argue that thieves may learn about valuable cargo if value is stated in the bill of lading: it is an invitation to steal. On the other hand, carriers have said that they need to know the value of the cargo in order to determine how much to charge and the degree of care which the cargo requires.

The real issue is how to achieve uniformity. It is useful to look at how other modes of transportation achieve uniformity. In maritime transportation, basic uniformity is established by COGSA. No regulatory oversight exists or is required. A similar legal basis for a bill of lading exists for air carriage. The Warsaw Convention, a treaty equal to Federal law, established the international air waybill. Many countries have adopted that treaty, and therefore its air waybill, as domestic legislation. The seventeen required documentary details are those which customarily are required for transportation (origin and destination, place of issue, etc. Note that the number of Warsaw air waybill requirements are in the process of being reduced). The International Air Transport Association (IATA) conditions of carriage supplement the Warsaw air waybill. The treaty-based requirements also are supplemented by the parties as necessary.

As stated to DOT in a comment by freight forwarders,<sup>49</sup> uniformity of the bill of lading means very limited uniformity of essential documentary details. A uniform bill of lading should not be “loaded up” with anything other than what the participants need. A uniform motor carrier bill of lading should be fashioned to the special needs of motor carriage.

DOT is of the view that no government regulatory oversight of bills of lading is necessary or desirable. If a uniform bill of lading is to be effectively established, it will have to follow the useful precedent established in the maritime and the air modes. Congress could provide a statutory list of minimum documentary requirements. The parties to the contract of motor carriage could then supplement the statutory requirements by additional details that are unique to the particular shipment; carriers and shippers could also adopt standard supplements like those adopted privately in the IATA conditions of carriage.

Uniform bills of lading usually are of long duration. The motor carrier uniform straight bill of lading was not changed for many years. Thus, it is quite feasible to use a Federal statute to recognize those minimum documentary requirements which are customary in the industry to establish a uniform bill of lading.

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<sup>49</sup> Transportation Intermediaries Association comments dated Nov. 14, 1996.

As shown by the three competing "uniform" bills of lading currently being offered, shippers and carriers have difficulty coming to agreement on uniform bills of lading. This conclusion is also evidenced in the submitted comments. In the past, when domestic shippers and carriers could not agree on a bill of lading, the ICC had to step in and formulate the rail and motor carrier documentation. In maritime and air carriage, the same situation existed and led to COGSA and the Warsaw air waybill. This experience indicates a possible direction to take and a practice from which to learn.

#### **6.4. *ELECTRONIC BILLS OF LADING***

Efficiency of transportation has become linked to electronic adaptability of bills of lading. Modern bills of lading regimes define and permit electronic bills of lading. The objective is to expedite documentation so that it does not delay transportation.

The special legal significance of signatures makes it important that electronic signatures be acceptable legally. The concern is that the electronic signature be authentic. This could be solved through adoption of statutory language that signature "means a handwritten signature, its facsimile or an equivalent authentication effected by any other means."<sup>50</sup>

The bill of lading should be adaptable to electronic processing. The main concern is that an electronic recording of the information in the bill of lading be readily and permanently available for all purposes, both during the transportation and afterwards, in case of claims caused by loss, damage or delay. Therefore, adoption of statutory language that the receipt or bill of lading "may be issued in any form that generates a permanent record," would be satisfactory. Furthermore, electronic data interchange (EDI), a computer-to-computer communication system based on prearranged and agreed terms of reference, should be acceptable.

Notices (for example, carriers' notices to shippers, or shippers' notices to carriers of claims) and requests (for example, shippers' requests for information) should likewise be usable to other parties to the transaction in any form that generates a permanent record, so that the parties respond to the notices and requests during the transportation, and permanent records are available afterwards in case of claims. Computer storage could be designed to satisfy the requirement for establishing a permanent record.

#### **6.5. *UNIFORM CONDITIONS OF CARRIAGE***

Uniformity of a bill of lading merely means that the most essential terms are uniform. It does not mean a statutory bill of lading. A particular trade may add terms that pertain just to it and are necessary to facilitate its trade. Furthermore, individual parties may add information that is peculiar to that particular shipment, for example the destination, or the nature of the particular cargo.

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<sup>50</sup> This definition is drawn from the international finance market, the 1988 U.N. Convention on International Bills of Exchange and International Promissory Notes, which is intended to facilitate international trade to the greatest possible extent.

The bill of lading for international air transport is a good example of additional terms of carriage. The Warsaw Convention establishes seventeen documentary requirements. The international air carriers have incorporated these seventeen details into the air waybill used by IATA. The IATA air waybill is not sanctioned by the Warsaw Convention; but it complies with the Warsaw requirements. Furthermore, the air waybill for each shipment contains additional information which is peculiar to the transportation of that shipment.

## **6.6. CONCLUSION**

In actual practice the bill of lading has become a receipt for the goods. In keeping with the philosophy of deregulation, any documentary details required by statute or treaty should be as few as possible. They should only be sufficient to indicate the applicable, uniform legal regime, leaving the parties free to formulate their own document.

## CHAPTER 7. PUBLIC INTERESTS

### 7.1. INTERNATIONAL HARMONY

49 U.S.C. 14706(g)(2)(B) states that the cargo liability study shall consider international harmony. International harmony is increasingly important to U.S. truck transport, because it often is one unit of a longer multimodal journey that includes a foreign point of origin or destination. The discussion above has referred extensively to international bills of lading, each of which has a liability regime. These international regimes will be described chronologically because the older regimes have significantly influenced the later regimes

#### Maritime

The international maritime liability regime, commonly known as the "Hague Rules," was adopted in 1924. It is very significant in the U.S. because it became the COGSA in 1936, and was also adopted as a treaty in 1937. Consequently, the Hague Rules apply both internationally and as U.S. national law. Many maritime bills of lading are issued for motor transportation inland from the port and thus may be applicable to U.S. motor freight. COGSA requires the carrier, on demand of the shipper, to issue a bill of lading. Thus, the carrier is not required to issue a bill of lading unless demanded by the shipper (however, the carrier customarily issues a bill of lading for its own protection). COGSA specifies the essential contents of the bill of lading, including the identification and weight of the cargo. The statutory liability limitation is \$500 per package. A lower limitation is not permitted, but the parties may negotiate a higher limit. There are seventeen carrier defenses to liability, including error in navigation by the carrier.<sup>51</sup> In order to limit liability,

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- <sup>51</sup> Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
- (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;
  - (b) Fire, unless caused by the actual fault or privity of the carrier;
  - (c) Perils, dangers, and accidents of the sea or other navigable waters;
  - (d) Act of God;
  - (e) Act of war;
  - (f) Act of public enemies;
  - (g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;
  - (h) Quarantine restrictions;
  - (i) Act or omission of the shipper or owner of the goods, his agent or representative;
  - (j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general; provided, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;
  - (k) Riots and civil commotions;
  - (l) Saving or attempt to save life or property at sea;
  - (m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;
  - (n) Insufficiency of packing;
  - (o) Insufficiency of inadequacy of marks;

maritime carriers stipulate in their bills of lading that the COGSA liability regime shall apply in domestic carriage.<sup>52</sup> Such contractual extensions of the maritime bill of lading will govern surface transportation, to the extent permitted by the law governing surface transportation. A number of countries have adopted updated versions of the Hague Rules (the Visby or the Hamburg Rules). The United States has not updated the Hague Rules.

## **Air**

Virtually all countries are parties to the 1929 Warsaw Convention, 49 Stat. 3000, T.S. 876, which establishes the international air waybill. The air waybill requires seventeen documentation details. Absence of some of these details from the air waybill will cause forfeiture of the limitation on liability provided cargo carriers under Warsaw. The air carriers' liability is limited to \$20 per kilogram (about \$9 per U.S. pound). A lower limitation may not be negotiated, but the shipper and the carrier may negotiate a higher limit. A carrier is presumed liable for loss, damage or delay, unless it proves that it has taken all necessary measures. Like maritime carriers, air carriers also use contractual extensions of the air regime to related surface transportation. Such contractual extension is permitted to the extent allowed by applicable surface transportation law. Most countries have adopted an updated version of the Warsaw air waybill (the 1955 Hague Protocol). The United States has not updated the Warsaw air waybill.

## **Motor**

All motor carriage in Europe and into Asia is subject to the Convention on the Contract for International Carriage of Goods by Road (CMR). The CMR Convention, much like the Hague Rules and the Warsaw Convention, establishes documentation requirements for the motor carrier bill of lading. All carriage under the CMR is subject to the Convention's liability regime which presumes the carrier's liability unless the carrier proves that it was not at fault. Liability is limited to 8.33 SDRs per kilogram (about \$5 per U.S. pound). The parties may not negotiate a lower limit, but the shipper may declare excess value and pay for excess value insurance and thus increase compensation for loss.

Shippers and carriers who are subject to the CMR are very satisfied with this regime. A recent European analysis of the forty year experience with the CMR Convention described it as the most successful unification of law ever.<sup>53</sup> Many member countries also use the CMR for domestic carriage and thus the law is uniform for all motor carriage.<sup>54</sup> There is virtually no motor carriage between the United States and Europe (except for a minor amount of roll on-roll off traffic).

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(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

<sup>52</sup> Gilmore and Black, *Law of Admiralty*, 2d ed., at 148.

<sup>53</sup> Prof. Roland Loewe, *La CMR a 40 ans*, *Uniform Law Review*, 1996, at 429.

<sup>54</sup> *Id.*

The experience with the CMR Convention is an interesting precedent for U.S. motor carriage. Both shippers and carriers tend to buy insurance coverage. The shipper buys full coverage for freight of all kinds and the carrier buys liability insurance (carriers' insurance covers not only liability up to the \$5 per pound limit but also the possibility of unlimited liability for intentional torts). Claims are settled among the carriers' liability insurers and the shippers' cargo insurers. In these settlements the cargo insurers recover (in their recourse actions) approximately 25 percent of their losses, that is 25 percent of what they paid out in compensation to their clients, the shippers. This is an interesting view of the division of the risk of carriage between the two interest groups. The particular risk division is caused by and governed by the CMR Convention's liability regime.

### **NAFTA Considerations (National Laws of Mexico and Canada)**

Given the statutory requirement for this study to consider international harmony, and given the greatly increasing traffic between the United States and Mexico, the possibility of working with Mexican limits on liability must be reviewed. The liability limitation in Mexico is reported to be about 3 cents per U.S. pound. This limit is so far below that which is realistic for the United States that it must be eliminated from our consideration.

The Canadian limitation is \$2 Canadian per pound (depending on the exchange rate, approximately \$1.50 per pound in U.S. dollars). The Canadian limitation has remained at this level for many years. It is difficult to update because it is based on Canadian provincial laws, and it is difficult to get all the provinces to act in unison. According to surveys of coverage it would only cover between 50 and 70 percent of the value of goods currently being transported by truck. This percentage would be so far below the standard of coverage for the vast majority of U.S. cargo that the Canadian limitation may be eliminated from consideration.

International harmony in the Americas could be established in the form of an Inter-American Convention on Carriage of Goods by Road. The members of the Organization of American States (OAS) are now considering using the CMR Convention as the model for an Inter-American liability regime with a uniform bill of lading. The CMR approach is like that of other liability conventions with which the U.S., Canada and Mexico are familiar (because they are all members of these treaties) such as the Hague Rules and the Warsaw Convention. Such an approach would be more likely to find acceptance. Most export and import in the Americas is by motor carriage and this approach would have the further advantage of uniformity with the improving economies of Central and South America. Most public comments, carriers and insurers and many shippers, favor a uniform liability regime for the Americas.<sup>55</sup>

### **7.2. INTERMODAL HARMONY**

The originating modal liability regime is often extended by contract to successive modes of transportation used to deliver the goods. The parties to the first contract of carriage stipulate that the originating carrier's liability regime shall apply to the entire journey. In the absence of such a stipulation, the different modal liability regimes will apply.

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<sup>55</sup> For a comprehensive study, see Larsen, the 1989 Inter-American Convention on International Carriage of Goods by Road, 39 Amer. J. Comp. L. 121 (1991).

Compensation for loss, damage, and delay should be in harmony among other modes of carriage so that the shipper is not surprised by significant disparities in compensation systems, and so that insurance companies can better assess the risk of carriage and are not surprised by extraordinary claims. Such harmony also would benefit those carriers that engage in multimodal carriage and would aid the courts in applying established case law to other modes of carriage.

Instructive is the Multimodal Liability Convention of 1980. It is useful conceptually, even though the U.S. is not a party. However, some of our significant trading partners, for example Mexico, are members.

The Multimodal Convention seeks to establish a harmonious liability regime among all the modes. However, on the issue of liability limitation it distinguishes between maritime and surface transportation. The reason is that when a maritime leg exists in multimodal transportation, it is the dominant leg and only harmony with the maritime liability limitation is necessary. However, if there is no maritime leg, then the limitation prevalent in other (surface) transportation is the guide to harmony. The Multimodal Convention adopted the limitation of the CMR Convention (8.33 SDR per kilogram, approximately \$5 per U.S. pound for surface carriage when there is no maritime leg. When there is a maritime leg the limitation is 2.75 SDRs per kilogram, approximately \$1.80 per U.S. pound). While the current flexible liability regime governing U.S. domestic motor carriage is somewhat out of tune with the international harmony suggested by the Multimodal Convention, it is possible that greater intermodal harmony could be created by making the Multimodal Convention more flexible and thus more in tune with the current domestic motor carrier liability regime.<sup>56</sup>

Harmony with other modes of transportation has also been previously discussed. The limitation under COGSA is \$500 per package. The per package limitation appears to be unique for maritime transportation and does not have direct relevance for other modes.<sup>57</sup> International aviation operates with a limitation of \$20 per kilogram (approximately \$9 per U.S. pound). Domestic air freight is not subject to any limitation and air carriers have established varying limits, as low as \$.50 per pound. Domestic rail carriage is similar to motor carriage in that carriers tend to contract unilaterally for low liability limits. However, intermodal harmony should not result in a reduction of the existing liability limit for any involved mode. Thus, if air is involved in intermodal transport, a uniform liability limit should not be less than the \$20 per kilogram (\$9.07 per pound) applicable for international air cargo transport under the Warsaw Convention.

The importance of intermodal harmony is related to ease of transportation under predictable terms. The Multimodal Convention carefully preserves to the individual shipper the option of shipping exclusively under a modal liability regime. Likewise, the Interstate Commerce Act preserves the options of shippers either to enter into a contract suitable for particular goods or to ship under the Sec. 14706 regime.

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<sup>56</sup> See discussion in Larsen *Air Transportation in Intermodal Setting*, 20 AASL 431 (1995).

<sup>57</sup> Except for express, package, and air carriage.



### **7.3. PUBLIC INTEREST**

#### **Policy Objectives**

The interest of the public concerning the liability regime governing motor carriers, freight forwarders, brokers, shippers, and insurers was basically formulated in 1940 by the National Transportation Policy and is restated in Sec. 13101(a)(2) of title 49, United States Code, as follows:

1. To encourage fair competition and reasonable rates for transportation by motor carriers of property.
2. To promote efficiency in the motor carrier transportation system and to require fair and expeditious decisions when required.
3. To provide and maintain service to small communities and small shippers.
4. To improve and maintain a sound, safe, and competitive privately owned motor carrier system.
5. To enable efficient and well-managed carriers to earn adequate profits, attract capital, and maintain fair wages and working conditions.
6. To promote intermodal transportation.

A liability regime which fairly allocates the risk of carriage would tend to improve safety of carriage because it would provide incentives to get the cargo intact to its destination. That would free carriers to concentrate on price and service competition which would benefit shippers.

A more predictable high standard of care, and certainty of compensation for failure to provide that high standard of care, will not only stabilize the transportation system, but will also make it more efficient. On the other hand, some current practices, such as lack of adequate notice of liability limitations, have adverse impacts on the motor transportation industry. These practices are unfair to the extent that they fall more heavily on small and occasional shippers than on large shippers.

The uniform liability regime would strengthen the bargaining position of the small and occasional shipper who would not be pressured into accepting a carrier's contract of carriage with very low levels of carrier liability. The small shipper would gain bargaining leverage. Small communities would likewise gain bargaining leverage. However, uniformity by itself is not efficient. Such a liability regime should provide the shippers adequate compensation for loss and damage.

Cargo safety would be advanced by creating strong incentives for both shippers and carriers to handle cargo carefully. Shippers would be more inclined to ship by motor carrier if they had

confidence the transportation system would provide adequate compensation for loss, damage, and delay. The cost of transportation would decrease with application of a more efficient claims compensation system.

A uniform liability system would create predictability and certainty of the legal regime. It would improve the relationship between carriers and shippers, reduce litigation and provide incentives for safe transportation because the risk of carriage would be more fairly distributed between carriers and shippers. However, as stated above, these benefits would only be realized if the uniform liability provides shippers adequate compensation.

## **Dispute Settlement**

Public interest includes dispute resolution. When Congress eliminated the ICC as a forum for dispute settlement, it was clearly determined to eliminate much administrative decision making. Congress did not give the Surface Transportation Board authority in this area. Furthermore, the ICCTA did not give DOT authority over cargo liability, other than to perform this study, and the Department did not express interest in acquiring such authority. To the contrary, DOT's Report to Congress on the Functions of the Interstate Commerce Commission, July, 1995, at page 33, strongly recommends to "eliminate all Federal dispute settlement functions." DOT's wish is to remove determination of loss, damage and delay disputes to the contracting parties and, if necessary, to the courts. The experience with settlement of liability issues in COGSA and under the Warsaw Convention demonstrates that the shippers, carriers, insurers and the public in general would be better served by private and judicial decision making.

Regarding decision-making by the judiciary, 49 U.S.C. 14706(d) provides that civil actions may be brought for violation of that section in a U.S. District Court or a State court. Action for loss, damage or delay may be brought against the delivering carrier in the jurisdiction where the delivering carrier operates. Action against the carrier responsible for the loss, damage or delay may be brought in the judicial district where loss, damage or delay occurred.

Experience with judicial decision-making in other modes of transportation, (maritime and aviation described above) indicates that the judiciary is adequately able, qualified and experienced to handle claims from loss, damage and delay of cargo in motor carriage. However, the parties to the dispute are always subject to the local priorities on the judicial calendar. Furthermore, high cost of court litigation may be disproportionate to the amounts of the claims. Alternative dispute settlement now is available in most courts.

Private dispute settlement in motor carriage is well illustrated by the legislated, uniform liability regime of the CMR Convention. Both shippers and carriers tend to buy insurance. The carriers buy liability insurance and the shippers buy cargo insurance coverage for freight of all kinds. Claims are then settled among the carriers' liability and the shippers' cargo insurers. In rare cases, when an issue of interpretation of the law needs to be settled, or if the facts are in dispute, claims are submitted for judicial decisionmaking.

Arbitration of claims in lieu of legal action in the courts could be an efficient way of settling disputes, maintaining peace and harmony between shippers and carriers, relieving pressures on the courts, and accelerating settlements.

In conclusion, it is preferable that the parties themselves directly or through their insurance companies settle claims privately. When private or insurance company settlements or arbitration are not possible then the courts should intervene to settle claim issues. Congress made it clear in the ICCTA that a government regulatory agency should not adjudicate loss and damage issues in the current deregulated environment.

#### ***7.4. THE KINDS OF CARRIAGE THAT ARE SUBJECT TO SEC. 14706 (CARMACK) LIABILITY REGIME***

The ICCTA required DOT to "conduct a study to determine whether any modifications or reforms should be made to the loss and damage provision" of Sec. 14706. This instruction is important in determining the scope of the study. Several kinds of carriage are either exempt from the Sec. 14706 liability regime or are specially regulated. For example rail carriage is now removed from Sec. 14706. Consequently, the Act specifically requested that the study focus on motor carriage. Thus, the scope of the study is delimited by the statute. Congress intended DOT to focus on the kinds of carriage regulated by Sec. 14706.

##### ***7.4.1. EXPANDED DEFINITION OF MOTOR CARRIER***

The scope of the DOT study became enlarged because the ICCTA, applies to "motor carriers". The Interstate Commerce Act no longer distinguishes between motor common carriers and motor contract carriers. Sec. 10102(15), before adoption of the ICCTA, defined a "motor common carrier" as a person holding itself out to the public as ready to provide motor carriage for compensation over regular or irregular routes. A "motor contract carrier" was defined as a person, other than a motor common carrier, providing motor carriage for compensation under continuing agreements with one or more persons (i) by assigning motor vehicles for a continuing period of time for their exclusive use, or (ii) intended for the distinct needs of such person or persons.

Motor contract carriage did not involve 'holding out' to accept all business. Thus the motor contract carriers could discriminate among customers and were not bound by the Carmack liability rules. In practice the two kinds of carriage gradually became indistinguishable and the need to distinguish between them became obsolete. 49 USC 13102(12) now defines a motor carrier as "a person providing motor vehicle transportation for compensation."

49 USC 14101(a) provides that a carrier is required to provide transportation or service on reasonable request. Consequently, although the statute does not define "motor carrier" as a common carrier it has described the attributes of a motor carrier other than a motor private carrier, which meets the definition of a common carrier at common law. That is the motor carrier which is the subject of Sec. 14706.

Although contract carriers are now part of motor carriage and come under Sec. 14706, all carriers, especially contract carriers, continue in their ability to control all aspects of their liability by separate contracts of carriage.

#### **7.4.2. FREIGHT FORWARDERS**

Fifty years ago freight forwarders were brought under ICC jurisdiction and made subject to the Carmack Amendment (56 Stat. 285 (1942), 64 Stat. 1113 (1950)). 49 USC 14706 specifically includes freight forwarders and they are made subject to the liability regime.

Sec. 13102(8) defines “freight forwarder” as a person holding itself out to the public (other than as a motor carrier) to provide transportation of property for compensation and who in the ordinary course of business (i) assemble and consolidate shipments and perform or provide for break-bulk and distribution operations of the shipments, (ii) assume responsibility for the transportation from the place of receipt to the place of destination; and (iii) use for any part of the transportation a carrier subject to the Interstate Commerce Act, Part B (limited to motor carriers and water carriers). The term “freight forwarder,” as used in the Interstate Commerce Act, does not include transportation by air carrier.

Freight forwarders are so closely associated with the stream of carriage that they became part of the carriage. Freight forwarders may sometimes issue their own house bill of lading to individual shippers whose goods the forwarder is consolidating. Thus, freight forwarders may act as agents or as principals, depending on the facts of each case. Freight forwarders could become the multimodal transport operators (MTOs) envisaged by the multimodal liability regime who would contract with shippers for carriage under the multimodal regime, and then subcontract the actual carriage to individual modal operators under their respective modal liability regimes.<sup>58</sup>

49 USC 14706(a)(2) provides that a freight forwarder is both the receiving and the delivering carrier. When a freight forwarder provides service and uses a motor carrier to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with the latter’s consent. Furthermore, the motor carrier, with the consent of the freight forwarder, may deliver property for the freight forwarder on the freight forwarder’s bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder’s delivery receipt.

The ICC regulated freight forwarders’ liability for loss, damage and delay of cargo (49 CFR 1084) including liability, surety bonds and certificates of insurance, and qualifications as self-insurer (also see 61 Fed. Reg. 54706 (1996)). There appears to be no reason to change the application of Sec. 14706 to them.

#### **7.4.3. AGRICULTURAL CARRIAGE**

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<sup>58</sup> See Tetley, *Responsibility of Freight Forwarders*, 22 ETL 79 (1987); also see Driscoll and Larsen, *The Convention on International Multimodal Transport of Goods*, 57 Tul. L. Rev. 193 (1982).

Motor carriage of agricultural products like that of private carriage has always been exempt from Carmack liability requirements.

#### **7.4.4. HOUSEHOLD GOODS**

The ICC regulated transportation of household goods very actively. Under 49 U.S.C. 14706(f) carriers of household goods “may petition [the STB] to modify, eliminate, or establish rates for the transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.” Carriers of household goods must agree to offer arbitration as a means of settling disputes with shippers concerning damage or loss to the household goods transported.<sup>59</sup> 49 CFR 1056.1 defines household goods as personal effects or property to be used in a dwelling but does not include goods moving from a factory or store.

49 CFR 1056.2 issued by DOT, requires detailed information for shippers about their rights and responsibilities when they move household goods. Household goods carriers must provide shippers with written estimates of charges which must be clearly marked binding or non-binding.<sup>60</sup> Household goods carriers are required to issue a detailed receipt or bill of lading to the shipper including a released rate valuation statement and evidence of insurance.<sup>61</sup> Household goods are to be transported with reasonable dispatch, and the shipper must be notified of any delays.<sup>62</sup> The liability of the household goods carrier is restricted. The carrier is liable up to the released or declared value limitation of liability. Finally, when settling a claim for loss or damage to household goods, the carrier “shall use the replacement costs of the lost or damaged item as a base to apply a depreciation factor to arrive at the current actual value of the lost or damaged item.”<sup>63</sup>

Continued Federal oversight of household goods is the result of Congressional feeling that consumers continue to need protective regulation. Apparently the intent of Congress was to keep household goods separate from the general liability regime in 49 USC 14706 (Carmack) and from any future liability regime that may be established for other transportation under section 14706. The current liability regime for household goods transportation could be considered as an option for Sec. 14706 motor carriage.

Whether a future separation should be maintained that keeps shippers and carriers of household goods from stipulating to use of any future liability regime established for transportation of other goods under Sec. 14706 would depend on how attractive and effective such a liability regime would be to both parties and the degree to which it would protect the interest of the typical

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<sup>59</sup> Under 49 USC 14708 household goods carriers must agree to offer arbitration. Arbitration is only mandatory if the dispute involves claims for \$1000 or less. “If the disputes involves a claim for more than \$1000 and the shipper requests arbitration, such arbitration shall be binding on the parties only if the carrier agrees to arbitration.”

<sup>60</sup> Sec. 1056.3.

<sup>61</sup> Sec. 1056.6.

<sup>62</sup> Sec. 1056.8.

<sup>63</sup> Sec. 1005.5(b).

household goods shipper. At the present time the special nature of household goods carriage indicates that its current liability limits should continue without change.

#### **7.4.5. PACKAGE EXPRESS CARRIAGE**

Transportation by package express carriers such as United Parcel Service, Federal Express and motor carriers of passengers (bus carriers), is subject to a released rate liability limitation on a per package basis. The special status of express and package carriage was established very early by the ICC, see Express Rates, Practices, Accounts and Revenues, 24 ICC 381 (1912) and Express Rates, Practices, Accounts, and Revenues, 43 ICC 510 (1917).<sup>64</sup> The shipper can increase the carrier-set liability limit by purchasing additional coverage--variously referred to as insurance or declared value coverage--from the carrier or by purchasing insurance elsewhere. Package express carriage is well defined and serves the specific area well. The current liability regime for package express seems to serve its niche well, including the unsophisticated and occasional shipper, and does not appear to be in need of change.

#### **7.4.6. CONTRACT CARRIAGE**

Much transportation is "contract carriage," which is governed by Sec. 14101(b) of title 49, United States Code. This statute provides that a carrier may enter into a contract "to provide specified services under specified rates and conditions." This kind of carriage is not governed by Sec. 14706 when so stipulated by the parties. The carrier and shipper negotiating for contract carriage may make any reasonable contractual stipulations, except that they may not waive provisions governing registration, insurance, or safety fitness. In their contracts many shippers waive their Carmack rights and remedies.

Large shippers tend to use the authority under Sec. 14101(b) to establish a contractual liability regime. A survey of approximately 100 shippers attending the February 1997 meeting of NASSTRAC indicated that approximately half of the shippers present had contracts with carriers. Contracts provide opportunity of clearly and unambiguously establishing liability according to relative bargaining power of the parties to each individual contract. However it is not clear how many knowledgeable shippers give up their rights under Sec. 14706.<sup>65</sup>

#### **7.4.7. MOTOR CARRIAGE INCIDENTAL TO AIR**

Under an exemption in 49 U.S.C. 13506(a)(8), cargo may move by motor carrier as part of a continuous movement by air. A motor carrier may pick-up and deliver air cargo, the assumption being that the pick-up and delivery are prior or subsequent to carriage by air. In addition, air carriers will contractually extend to the surface legs the liability regime for carriage by air.

Foreign air carriers are not entitled to this privilege in the United States unless the Secretary of Transportation is satisfied that their governments accord U. S. carriers the right to pick up and

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<sup>64</sup> Liability for express shipments and checked baggage carried by motor carriers of passengers is limited by 49 CFR 374.307(c).

<sup>65</sup> Inland Marine Underwriters Assoc. comments dated June 30, 1997.

deliver goods in their countries 49 U.S.C. 13506(a)(8)(B). This privilege has been extended on a case by case basis.

#### **7.4.8. OTHER TYPES OF MOTOR CARRIAGE**

Many other types of carriage are excluded from the Interstate Commerce Act or from the Sec. 14706 liability regime. Purely intrastate carriage is excluded.<sup>66</sup> Also exempted are transportation of wood chips; transportation of broken, crushed and powdered glass; transportation in a municipal zone; occasional carriage; and emergency towing, and other types of carriage.<sup>67</sup>

#### **7.4.9. CONCLUSION**

Less than one fourth of all motor carriage may be transported under the Sec. 14706 liability regime. Significant sections of motor cargo transportation are not included within the scope of the existing Carmack liability regime. Thus, these forms of motor carriage should not be included in the consideration and formation of the liability regime, because they are not governed by it. The scope of a uniform liability regime should only be motor carriage to the extent it is currently subject to Sec. 14706. Thus the special needs of a variety of carriage are preserved.

#### **7.5 INTERESTS OF THE CARRIERS**

Carriers are primarily interested in a liability regime that promotes the efficiency of carriage, minimizes their expenses to the extent possible, satisfies their customers and promotes repeat business. Carriers want shippers to act responsibly, to pack their cargo well, comply with hazardous materials regulations, and do what they can to avoid damages.

The extraordinary satisfaction of the European carriers with the CMR Convention on motor carriage indicates that U.S. carriers might be well-served by a uniform liability regime. The CMR regime provides certainty, stability, insurability and yet places fair pressure on shippers to act responsibly. Significantly, under the CMR convention, cargo insurers are able to recover, in recourse actions against carrier liability insurers, approximately 25 percent of their losses which they have paid out to shippers who insured against risks of all kinds.<sup>68</sup> This indicates that the CMR Convention places a very significant share of the risk of carriage on the shippers, but also leaves a significant share of the risk of carriage on the carrier. This ratio may appear to favor the carrier; however, this ratio is not worse than the full value risk allocation under the Carmack regime. The recovery ratio under Carmack may be even more favorable to the carrier due to denied claims, released rates and exceptions to liability.

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<sup>66</sup> See FAA Authorization Act of 1994, P.L. 103-305, title VI section 601.

<sup>67</sup> See 49 U.S.C. 13506.

<sup>68</sup> Based on correspondence with large European cargo insurer.

A particular carrier problem deserves attention. Carriers are currently frustrated in providing continuous or even subcontracted service into Mexico and Latin America.<sup>69</sup> Carriers would benefit from U.S. adoption of an Inter-American Convention on international carriage of goods by road. The right Inter-American convention would establish a uniform liability regime making the liability law the same on both the North and the South sides of the border. It could also establish the basis for a uniform bill of lading. In consequence, there would be no need to issue new documentation at the border. Because the legal regime would be stable and the risk known, the transportation would be insurable from origin to destination regardless of the location of the goods.

## **7.6. INTERESTS OF SHIPPERS**

There are many different kinds of shippers using different approaches for motor carriage of goods. This statement of shipper interests is focused on the Sec. 14706 shippers. These shippers are primarily interested in a liability regime which will promote efficiency of carriage, get the cargo safely to its destination, and make the shipper whole when the cargo is lost or damaged.

Considering that the cost of liability is such a small percentage of the value of the goods being carried, the greater interest of the shipper is in a stable uniform liability regime linked to a uniform bill of lading that fairly informs the shipper of the conditions of carriage. Shippers are interested in a self-policing regime which they do not have to monitor endlessly. That regime must be sufficiently stable that it is readily insurable.

Shippers are interested in placing a large share of the risk of carriage on carriers to provide a strong incentive to be careful. They are interested in preserving the option of receiving full value for loss, damage or delay. Thus they may also be interested in a strong liability regime, which provides full value compensation with the option of negotiating less compensation. Furthermore, shippers in international motor carriage may benefit from and have interest in a uniform Inter-American liability regime linked to a uniform bill of lading regime.

## **7.7. FREIGHT FORWARDERS' INTERESTS**

Freight forwarders share the shippers' interest in a strong liability system, and have also expressed concern with the fragmentation of the uniform bill of lading that has occurred after ICC sunset. They favor a uniform bill of lading. "With the removal of tariff filing requirements, transaction documentation has become a primary issue."<sup>70</sup>

## **7.8. INSURANCE INTERESTS**

Certainty and predictability of the liability regime is very much of interest to insurers because they need to quantify the risks for which they assume responsibility. If they cannot gauge these risks

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<sup>69</sup> See Disparities in the Law and Practice of Surface Transportation of Goods Between the United States and Mexico, Study performed for FHWA by the National Law Center for Inter-American Free Trade. The Center is involved in research on Inter-American legal issues; NLCIFT/WD4/7.93.

<sup>70</sup> Transportation Intermediaries Association statement dated Nov. 14, 1996.



then they may make adjustments in order to be on the safe side when loss occurs. If the uncertainty becomes too great, then insurance becomes unavailable. An example is motor carriage into Mexico. The liability risks south of the border are so uncertain and subject to Mexican regulation that insurance for this traffic is unavailable for purchase north of the border.<sup>71</sup> Representatives of the insurance trade associations in the NAFTA countries have begun to address the problems, such as the availability of adequate insurance. They met for the first time on Feb. 26, 1997, at a meeting co-sponsored by DOT, and are planning to meet again. Certainty and predictability of the law will not only make insurance available, but the more precisely the exact risk can be ascertained, the lower the price of insurance may become, because insurers may then not have to insure against unpredictable events.

However, in the meantime, insurers are comfortable with and have developed business practices on the basis of the currently established liability system.<sup>72</sup>

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<sup>71</sup> See NLCIFT study *supra*; also see Menon, Container Crooks, Containerization International, March, 1997.

<sup>72</sup> Inland Marine Underwriters Association comments dated June 30, 1997.

## CHAPTER 8. RECOMMENDATIONS

### 8.1. GENERAL

In the wake of ICCTA, some uncertainty and ambiguity about the liability regime governing the relationship between carriers and shippers appeared. However, the seeds of these uncertainties and ambiguities predated the 1995 Act and were sowed by the deregulation policies expressed in the 1980 Motor Carrier Act and TIRRA. These two acts and the ICCTA drastically decreased Government oversight, leaving greater room for natural economic market forces to play.

This study has explored the current liability issues in the context of other liability regimes applicable to domestic and international transportation. The study also explored the specific issues which Congress in Section 14706 required be examined. The overall DOT recommendation is that the liability regime for motor carriage should be fair to all shippers and carriers, regardless of size of operation or frequency of use. Key components of a fair liability regime include mutually understood terms of liability, an appropriate sharing of responsibility among parties, and ease of administration of the system. It is the Department's conclusion that the current liability system functions reasonably well and that it requires only modest adjustment to assure fairness to all parties. The key issue areas are the following:

### 8.2. NOTICE

**Discussion:** One of the major concerns arising from recent motor carrier deregulatory legislation is that many shippers feel deprived of fair notice of the applicable liability regime, in particular limits on liability. This results from the Sec. 14706(c)(1)(B) provision that the carrier shall provide notice to the shipper "on request of the shipper." In practice such notice is often not readily available or reliably obtained. Several options exist for resolving this notice issue.

**Option One:** Through legislation, delete the reference in 14706(c)(1)(A) "subject to the provision of subparagraph (B)," the result of which would be that the ambiguity surrounding liability notification would be eliminated. The carrier could establish liability by declaration of value by the shipper or by written agreement between the carrier and the shipper. If the parties enter into a written agreement establishing the liability for the property carried and a limitation on liability, there would be no argument that the shipper had not received notice. Paragraph (B) would permit the shipper, upon request, to receive other pertinent information related to the applicable rate.

**Option Two:** Recommended by STB<sup>73</sup> is for DOT to adopt a notice requirement by regulation, similar to the STB notice requirement for household goods transportation, that is: require the carrier to provide "actual notice to individuals whose shipments are subject to the tariff." Household goods carriers are not permitted to enforce the provisions of the applicable tariff

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<sup>73</sup> Letter to DOT dated July 2, 1997.

unless they have complied with the actual notice provision. The notice is incorporated into the bill of lading or other document embodying the contract for transportation.<sup>74</sup> Under this option DOT would assume legal authority to regulate motor carrier tariffs, would determine that it would “be reasonable” to require carriers to give actual notice, and would not permit carriers to enforce the provisions of the applicable tariffs unless the carriers had complied with the actual notice provisions. Such an approach is not accepted because DOT does not have the same explicit legal authority to regulate tariffs that STB has for household goods and the Department does not wish to re-establish a tariff system.

**Option Three:** Private action. Carriers and shippers should jointly resolve the problem and determine a satisfactory method of providing notice.

**Recommendation:** While option one would require legislation, it would be the most decisive and effective resolution. Option two proposed by STB is not a viable solution as explained above. Option three is always open to the parties, but the existence of the problem suggests that private action is not solving the issue.

### **8.3. *UNIFORM LIMIT OF LIABILITY***

**Discussion:** The currently applicable Carmack regime provides strict full value liability with five defenses to liability. Because of these defenses, some claims are not honored because carriers are not legally obligated to pay them. Furthermore, shippers do not present some claims because the legal expenses of pursuing the claims are too great. Many claims are limited to less than full value because shippers have agreed to a limitation on liability or released rates. Accordingly, in actual practice, carriers often do not bear full liability for the risk of carriage.

Currently, there is no one uniform liability regime. While some shippers and carriers want maximum flexibility for contractual allocation of the risk of carriage, others argue that a fixed limit, as in other liability regimes, would provide greater certainty and fairness.

Establishing a liability limitation is not only a problem of resolving these diverging views. DOT would need an objective statistical basis for recommending a limitation. An objective statistical basis would provide understanding of fairness and adequacy of current compensation for loss and damage, but it is beyond the scope of this study.

**Option One:** No change. Continue the currently applicable full value regime with flexibility to vary liability by released rates or contract.

**Option Two:** Establish a set liability limit with the option that the shipper could declare a higher value and purchase excess valuation coverage.

**Recommendation:** DOT recommends that the current system of full value recovery with flexibility to vary liability by released rates or contract be continued until the parties come closer

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<sup>74</sup> 49 CFR 1310, 62 FR 5171, Feb. 4, 1997.

to agreement on an alternative liability regime. Furthermore, if there is no fixed liability limitation, then other difficult and contentious limitation issues, such as whether to limit liability per package or per shipment, or whether limitation should be broken in case of intentional torts, need not be addressed.

#### **8.4. *INSURANCE COVERAGE***

**Discussion:** In domestic transportation, shippers currently carry a major portion of the risk of carriage, whether due to the effect of carriers' defenses to liability, because of unfiled claims, because shippers have agreed to less than full value liability, because of released rates, because carriers are unable to compensate due to bankruptcy, or due to carriers' simple refusal to make payment. Domestic shippers are exposed to a substantial risk which they should consider covering by cargo insurance in the same way that they cover their transportation risk in international carriage. Insurance to cover these risks is readily available and at reasonable cost.

**Recommendation:** Shippers are encouraged to cover their transportation risk exposure by cargo insurance. The existing insurance system appears adequate to serve shippers and carriers and there has been no suggestion that insurance is unavailable. A legislative or regulatory solution is not needed in this area.

#### **8.5. *BILL OF LADING***

**Discussion:** The bill of lading has achieved undeserved legal significance. It is, in fact, a receipt for the goods, but it is often thought to be the contract of carriage. The bill of lading is not a good instrument by which to contract for carriage. It often is signed by the truck drivers or shipping clerks. It should merely be a receipt for the goods. When the shipper and the carrier have a separate transportation contract it will normally prevail over the bill of lading. Thus if the bill of lading refers to the governing contract, but includes basic identifying information about the particular shipment, for example names of consignor and consignee, origin and destination, number of packages, description of the cargo, and weight, then it serves its basic function as a receipt.

**Recommendation:** Shippers and carriers should establish a uniform bill of lading containing minimum identifying information. In the event that the parties cannot agree, then DOT (FHWA) should designate minimum requirements along the lines of proposed rulemaking of October 21, 1996.<sup>75</sup>

#### **8.6. *INTERNATIONAL HARMONY***

**Discussion:** Carriers and shippers tend to view domestic U.S. motor carriage in isolation from other modes of transportation. On the other hand, carriers and insurers tend to favor a uniform Inter-American liability regime for international motor carriage. Shippers express no opposition to an Inter-American liability regime and would probably favor the right liability regime if one

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<sup>75</sup> 61 Federal Register 54707.

could be negotiated. (NASSTRAC commented that "international caps are justified solely because there are at least two sovereigns involved in every international shipment." Accordingly, "there is a measure of justice in negotiating international liability limits which can be applied uniformly.")<sup>76</sup>

**Recommendation:** Nations should consider proceeding on an Inter-American Convention on international carriage of goods by road.

## **8.7. INTERMODAL HARMONY**

**Discussion:** Cargo is increasingly transported by more than one mode. There is consistency between rail and motor carrier liability because both are based on the Carmack Amendment. However, there is little consistency between motor carriers' liability and the regimes for maritime and air carriage. Furthermore, there is little harmony between the motor carrier liability regime and the regime of the Multimodal Convention. The Multimodal Convention is a proposed international treaty-based liability regime governing multimodal carriage from inland origin in one country to inland destination in another country. Participating countries have the option of adopting the regime as domestic law. Nevertheless, intermodal harmony should not result in a reduction of the existing liability limit for any involved mode. Thus, if air is involved in intermodal transport, a uniform liability limit should not be less than the \$20 per kilogram (\$9.07 per pound) applicable for international air cargo transport under the Warsaw Convention.

**Recommendation:** The lack of harmony among motor, air and maritime liability regimes is an emerging issue because of the increasing use of intermodal transport. However, this study did not identify problems which appear to require immediate action. Instead, DOT recommends that shippers and carriers encourage and work toward multimodal harmony, and possibly reexamine the Multimodal Liability Convention with the goal of making the proposed multimodal regime more flexible and adaptable to each mode and to both domestic and international transportation. However, if air is involved in intermodal transport, a uniform liability limit should not be less than the \$20 per kilogram (\$9.07 per pound) applicable for international air cargo transport under the Warsaw Convention.

## **8.8. DISPUTE SETTLEMENT**

**Discussion:** Shipper-carrier dispute settlement under the ICCTA has shifted in the direction of judicial decision making. Court trials can take a year or more. Swifter dispute settlement would be generally appreciated. Mediation and arbitration are increasingly popular means to deflect cases from the main stream court process or at least to resolve common issues leaving only those problems that truly are "in controversy" for the courts to decide.

**Recommendation:** No administrative Governmental intervention is recommended in dispute settlement, but increased use of methods such as mediation and arbitration is recommended to

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<sup>76</sup> NASSTRAC comments dated July 3, 1997.

accelerate settlements and relieve pressure on the courts. Shippers, carriers, and insurers should jointly develop and promote use of these processes.

### ***8.9 NEED FOR BETTER SHIPPER-CARRIER UNDERSTANDING***

**Discussion:** This study produced a wealth of shipper-carrier input. The parties were considerably apart in December 1995 at the time ICCTA was adopted. The public meeting at DOT in February 1996 was followed by a round of written comments which lasted through the remainder of 1996. Shipper and carrier trade associations placed cargo liability issues on their national meeting agendas. These meetings served as valuable fora for exchange of information and for explanation of positions. All this information provided very useful input for the draft cargo liability study. The draft study was issued at the end of May 1997 so that the parties could correct any errors in the draft, and further explain their positions. In fact, the parties clarified their own thinking in studying and explaining their positions. Thus, the process in itself tended to promote better understanding. Understanding would be enhanced in the future if the study stimulated shippers and carriers to continue their own dialog and activities in the field of cargo liability.

**Recommendation:** Shipper-carrier discussions of cargo liability issues should continue, and should pursue issues such as inter-American harmonization of motor carrier liability. Further government involvement in this area--such as negotiating an Inter-American Convention or a Multimodal Convention--would be appropriate only if there appears to be emerging agreement on key elements that might be covered in future legislation, regulation, conventions, or voluntary agreements.

### ***8.10 RATIFICATION OF MONTREAL PROTOCOL NO. 4***

**Discussion:** The current Warsaw Convention which sets the liability limits for air cargo transport includes archaic provisions which constitute a substantial impediment to air cargo facilitation through electronic data transmission. Since the utilization of normally higher priced air transport for air cargo shipments depends on the speed of delivery of the goods, removal of such impediments is of paramount importance to the economics of air cargo transport. Accordingly, the Departments of State and Transportation have urged that the Senate give its advice and consent to U.S. ratification of the 1975 Montreal Protocol No. 4, which amends the Warsaw Convention and its updated Hague Protocol, to remove these impediments.

**Recommendation:** The U.S. Senate should promptly give its advice and consent to ratification of the 1975 Montreal Protocol No. 4, which amends the Warsaw Convention to remove impediments to facilitation of air cargo shipments.

## APPENDIX 1: SUMMARY OF COMMENTS BY MAJOR ORGANIZATIONS

NAME	COMMENTS
American Movers Conference	Released rates for personal effects household goods are also used by movers for computers, copiers, etc. However, movers transporting non-personal effects shipments requiring special handling and equipment have an interest in any future changes in liability rules, since they now have flexibility to negotiate liability with shippers. AMC supports ATA comments. The current limited liability should be preserved. The current HHG carrier liability system should be maintained.
Transportation Consumer Protection Council, Inc.	If carriers are currently free to limit their liability, and in light of now commonplace maximum liability limitations, why is there need for legislating a statutory liability system that will further harm shippers? Rather than fixing a limit, the public interest would be better served by a recommendation that carriers be required by statute to notify customers of limitations before shipping, offer a choice of rates, and require shippers written consent before any limitations of liability apply. Comments were supported by about 150 shippers.
American Trucking Associations, Inc.	Comments on behalf of RCCC, NFC&SC, ITCC, NMFTA, and R&DCC. DOT has preliminary data, by mode, on cargo values compiled by BTS in "1993 Commodity Flow Survey." DOT should prepare a comparative analysis of domestic truck liability with other U.S. domestic and international transportation, and other nations, particularly Canada and Mexico. Carmack should be replaced with a representative value per pound, such as \$2 per pound. A motor carrier and its customer should still be able to negotiate a higher or lower liability limit. Limited carrier defenses should remain, as well as current time limits for submitting claims and judicial review. For most shipments, rates and charges are not determined by reference to either the current NMFC or NCC's value guidelines. The importance of value per pound with regard to classification should not be overestimated; it is only one element of the liability characteristic. A motor carrier industry survey provides a representation of the value of freight upon which claims are filed. Support a statutory liability standard of \$2.50/lb. for LTL and \$1.10/lb. for TL. Carriers lack knowledge of value of shipments tendered and what their liability is on an individual shipment. Limits are used in many other modes. Knowledge of value will permit carrier to provide appropriate protection, or to provide additional protection/liability for additional charge. Provided "Confidential" data to support proposed liability limits. Proposed \$9 per pound international air freight standard is not an appropriate comparative standard for motor carriers. DOT's own 1993 commodity flow survey shows air freight value as \$26.07 per pound vs. motor carrier of \$.35 per pound, or \$1.82 per pound truck and parcel freight combined. ATA still proposes \$2.50 for LTL and \$1.10 for truckload, per pound of freight lost or damaged. Comments were supported by about 150 carriers.
Transportation Intermediaries, Inc.	TIA recommends that no new regime of cargo liability limitation be established by statute or regulation, and that parties be allowed to enjoy the full range of market options for risk allocation, risk management, and risk underwriting.
Landstar, Inc.	Supports continuation of Carmack. Since the carrier is in the best position to know what happens to the goods, it is appropriate that the carrier is the responsible party; the carrier has the most experience in terms of developing policies and assessing the risks that arise from transportation; the carrier is generally in closest contact with the goods, it is most logical

	for it to insure the goods against loss; and the current system has been in place, claims may be readily resolved based on years of experience and precedent of court decisions
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National Small Shipments Traffic Conference, Inc., and Health and Personal Care Distribution Conference	<p>The present version of the Carmack Amendment is working well and it needs no tinkering. Carrier responsibility is what limits loss and damage in transit. With full value liability, the carrier has the best incentive to deliver the goods intact and undamaged. There is no need for “international harmony” to reach a decision on liability valuation for domestic purposes.</p> <p>Most serious problem is notice. Shippers want to retain Carmack full liability, but need notice of released rates. ICCTA provides [sec. 14706(c)(1)(A)] that a carrier may establish limited liability provided such limitation is established by written or electronic declaration by the shipper or by written agreement between the shipper and carrier. If the shipment moves on a released rate, the carrier must provide notice of that released rate on the bill of lading or other shipping document and the shipper must make written assent to it.</p> <p>Most serious problem is notice. Shippers want to retain Carmack full liability, but need notice of released rates. ICCTA provides [sec. 14706(c)(1)(A)] that a carrier may establish limited liability provided such limitation is established by written or electronic declaration by the shipper or by written agreement between the shipper and carrier. If the shipment moves on a released rate, the carrier must provide notice of that released rate on the bill of lading or other shipping document and the shipper must make written assent to it.</p>
United Parcel Service./ Federal Express Corp.	<p>Both UPS and FedEx support retention of <u>status quo</u> for carriers operating under the existing released rate/shipper declared value liability structure. No shipper group has expressed concern, or proposed changing UPS’s current liability structure. UPS uses all modes, air truck, rail, water, but uses only one liability system.</p>
National Industrial Transportation League, Inc.	<p>Carmack provides for a system that most fairly allocates the risk of cargo loss and damage between shippers and motor carriers. The full liability standard places primary responsibility of ensuring that goods moving are transported safely by carriers--the party that maintains possession and control of the goods during transit. Changes in the existing system should not be considered unless there is evidence that reform would better serve the transportation industry as a whole, carriers, shippers and the general public. The motor carrier sample is too small to determine average value of traffic today. NITL believes all traffic should be covered by liability limit, with only extraordinary value shipments subject to additional charges. A fixed-value liability system would be a step in the wrong direction. A fixed-value liability system would eliminate incentives for motor carriers to exercise due care to protect shippers’ freight and would likely increase the number of loss and damage incidents. NITL requests DOT recommend that Congress retain full liability standard of the Carmack Amendment with respect to motor freight.</p>
Inland Marine Underwriters Assoc.	<p>“To upset the present, well-established liability system on the basis of an outdated (1975) study, anecdotal examples and erroneous interpretations of past ICC practices and current ICCTA law does not appear to be warranted or prudent. The draft study itself decries the lack of current statistics and information in this area. In our view, it would be more appropriate to maintain the current system until better evidence is developed showing the necessity and advisability of such radical changes.”</p>
Surface Transportation Board	<p>With regard to shipper notice, STB in connection with HHG shipments, requires that shippers be explicitly informed whenever the provisions of a tariff (price) are incorporated into the bill of lading or other documents embodying the contract for transportation, and that such provisions be made available for public inspection.</p>

## APPENDIX 2: GLOSSARY

ATA	American Trucking Associations, Inc.
BTS	DOT Bureau of Transportation Statistics
CFR	Code of Federal Regulations
CIM	Convention on the Carriage of Goods by Rail
CMR	Convention on the Contract for International Carriage of Goods by Road
COGSA	Carriage of Goods by Sea Act
DOT	Department of Transportation
EDI	Electronic Data Interchange
FedEx	Federal Express
FHWA	Federal Highway Administration
IATA	International Air Transport Association
ICCTA	ICC Termination Act of 1995
ICC	Interstate Commerce Commission
LTL	Less than Truckload
MTO	Multimodal Transport Operator
NAFTA	North American Free Trade Agreement
NASSTRAC	National Small Shipments Traffic Conference
NLCIFT	National Law Center for Inter-American Free Trade
NRA	Negotiated Rates Act
RO-RO	Roll-on Roll-off
SDR	Special Drawing Right
STB	Surface Transportation Board
TCPC	Transportation Consumer Protection Council
TIA	Transportation Intermediates Association, Inc.
TIRRA	Trucking Industry Regulatory Reform Act
TSI	Transportation Solutions, Inc.

### APPENDIX 3: SUMMARY OF LOSS AND DAMAGE COST FACTORS

Summarized in Table 26 of the 1975 DOT Cargo Liability Study are the cost factors developed from the foregoing statistic relating to export, import and domestic trade. They are expressed as a percentage of the value of goods.

#### SUMMARY OF LOSS AND DAMAGE COST FACTORS AS PERCENT OF VALUE OF GOODS 1975 DOT CARGO LIABILITY STUDY

ITEM	EXPORT	MANUFACTURERS		RETAILERS-WHOLESALERS	
		IMPORT	DOMESTIC	IMPORT	DOMESTIC
Insurance					
Premiums	.108%	.179%	.009%	.348%	.120%
Net Loss and					
Damage	.012%	.050%	.013%	.082%	.040%
Administration	.020%	.006%	.006%	.018%	.011%
Totals	.140%	.235%	.028%	.448%	.171%

#### APPENDIX 4: CARGO LIABILITY COST FACTORS

Table 35 of the 1975 DOT Cargo Liability Study contains a summary of the identifiable modal cargo liability cost factors. As reflected in this table, these cost factors fall in the range of one or two percent of freight revenue for all modes. It is reemphasized that these factors are reflective only of industry-wide costs.

TABLE 35  
SUMMARY OF  
CARGO LIABILITY COST FACTORS  
1975 CARGO LIABILITY STUDY

MODE	CLAIMS PAID	NET COST OF INSURANCE SYSTEM	TOTALS
MOTOR CARRIER	1.12%	0.20%	1.2%
RAILROAD	1.75%	NR	1.75%
DOMESTIC AIR	1.08%	0.25%	1.33%
INTERNATIONAL AIR	1.91%	0.14%	2.05%